

No. 16455 ✓

United States
Court of Appeals
for the Ninth Circuit

LUCY K. COHEN, Appellant,

vs.

WESTERN HOTELS, INC., and E. B. DeGOLIA,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

AUG 13 1959

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court, Northern District
of California, Southern Division

Civil Action No. 36938

LUCY K. COHEN,

Plaintiff,

vs.

WESTERN HOTELS, INC., a corporation, and
E. B. DeGOLIA, Defendants.

COMPLAINT (FOR DAMAGES FOR PERSONAL INJURIES) AND REQUEST FOR JURY TRIAL

Plaintiff complains of defendants and each of them and for cause of action alleges:

I.

(a) The jurisdiction of this Court is founded on diversity of citizenship and amount. 28 USC §1332.

(b) Plaintiff is also known as Lucy M. Kramer, Lucy Kramer Cohen, and Mrs. Felix S. Cohen. At all times hereinafter mentioned, she was and now is a citizen of the District of Columbia.

(c) At all times hereinafter mentioned, defendant Western Hotels, Inc., was and now is a corporation organized under the laws of the State of California, and doing business in this District.

(d) At all times hereinafter mentioned, defendant DeGolia was and now is a citizen of the State of California.

II.

(a) At all times hereinafter mentioned, defendant DeGolia was the owner of premises located at 761 Post Street in the City and County of San Francisco, State of California, which premises were and now are operated as a hotel under the name "Hotel Maurice".

III.

At all times hereinafter mentioned, defendant Western Hotels, Inc. was and now is managing and operating said premises at 761 Post Street in the City and County of San Francisco, State of California, as agent of the defendant DeGolia; defendant Western Hotels, Inc. at all such times was and now is maintaining therein a hotel under the name "Hotel Maurice", and at all such times had and now has actual control of said premises.

IV.

On or about August 14, 1957 defendant DeGolia as owner, and defendant Western Hotels, Inc. as agent and as operator, were each separately charged with and responsible for the good, proper and safe maintenance of the premises at 761 Post Street, San Francisco, in a reasonably safe condition.

V.

On August 14, 1957 said Hotel Maurice was not maintained in a reasonably safe condition, inasmuch as there then was spread in its lobby a rug which

was not reasonably safe, and which was negligently and improperly maintained, in that:

(a) Said rug was not fastened securely to the floor.

(b) Said rug was allowed to form loops, wrinkles, ridges and other uneven places, and to bunch up at its edges, and did not lie flat against the surface of the floor.

(c) Said rug was so secured under two heavy potted plants as to bunch up between them and form loops, wrinkles, ridges and other uneven places and to bunch up at its edges, and not to lie flat against the surface of the floor.

(d) Said rug was situated on a mat which was smaller than the rug, and consequently there were formed loops, wrinkles, ridges and other uneven places at the points where the edge of the rug extended over the edge of the mat.

(e) Said rug was worn and dilapidated to a point where its fabric had broken down and formed uneven places, wrinkles, ridges and depressions, and where holes and bare and worn spots had appeared in its weave.

All of these conditions were the result of the failure of each of the defendants to use a proper and necessary degree of care to keep said lobby reasonably safe for guests of the hotel.

VI.

The dangerous and unsafe condition of said lobby and rug, described in paragraph V hereof, had existed long prior to August 14, 1957, and defendants

and each of them had or in the use of reasonable care should have had, full knowledge thereof prior to that date. Nevertheless defendants and each of them negligently, with want of due care and with reckless and wanton disregard for the safety of the guests of said Maurice Hotel, caused and permitted said rug to remain in the lobby of the hotel in its unsafe and dangerous condition as aforesaid.

VII.

Plaintiff, Lucy K. Cohen, had rented a room in said Maurice Hotel from defendants and each of them for the night of August 13, 1957 and had occupied said room during the night of August 13.

VIII.

On August 14, 1957 at or about the hour of 7:20 a.m., plaintiff checked out of said Hotel Maurice and attempted to leave the premises to return to her home in Washington, D. C. She then and there tripped and fell over and became trapped and ensnared in a loop, wrinkle, ridge, and uneven and bunched up place in said rug, and thereby was thrown and fell against the floor and sidewalls of the lobby of said hotel, as a consequence of which she suffered serious injuries and other loss and damages as hereafter set forth.

IX.

Plaintiff's fall and injuries were the direct consequences of the acts and omissions of each of the defendants in negligently permitting and suffering

said lobby and rug then and there to exist in such improper, dangerous and unsafe condition, as alleged in paragraphs V and VI of this complaint.

X.

As a direct and proximate result of defendants' careless and negligent conduct, plaintiff sustained severe bodily injuries, consisting of a multiple and shattering fracture of the right kneecap and several severe tears of tendons and ligaments in the vicinity of the right knee, extensive bleeding, cysts, multiple contusions and abrasions, trauma and faintness. Plaintiff is informed and believes and therefore alleges that the injuries complained of are permanent in nature and that by reason of said injuries she will be crippled and physically incapacitated for the remainder of her life.

By reason of the premises, plaintiff suffered physical disability and excruciating pain and anguish and will in the future so suffer, to her general damage in the sum of \$75,000.00.

XI.

At the time of said accident plaintiff was approximately 44 years of age and was gainfully employed by the United States Government at Washington, D. C., and also earned income as a writer and compiler of articles for publication. As a result of the injuries caused by defendants' said negligent and careless conduct plaintiff was unable to pursue her employment from August 14 to October 14, 1957, suffering a loss of income from the United

States Government in the amount of \$1,540.00, and from writing and editing in the amount of \$350.00, and plaintiff's health further was and will be so impaired that she may hereafter be disabled and prevented from pursuing her occupation and employment. Consequently plaintiff has suffered loss in the amount of \$1,890.00 and will suffer such loss and diminution of earnings hereafter in an amount which is not known. When this loss is determined plaintiff will amend this complaint to allege the full extent thereof.

XII.

As a direct and proximate result of the negligent and careless conduct of defendants and each of them, plaintiff was caused to and did become hospitalized and became liable for hospital, doctors', surgeons', nurses', drug and other bills; and plaintiff was caused to and did incur bills and charges for additional transportation, special garments, telephone calls and divers and sundry other things and services resulting directly from her confinement at a place away from her home to which she was in the process of returning on the morning of the accident; and plaintiff did require and become liable for special expenses for medical and physical therapy, special household help, taxi fares, supervision and travel and similar costs with regard to her minor daughters, and divers other services and things which she would not have required except for her incapacity resulting from said accident. The reasonable cost of all of these bills and expenses,

now incurred and which may reasonably be expected to be incurred hereafter is estimated at \$15,000.00.

XIII.

Plaintiff is informed and believes and therefore alleges that her injuries will hereafter require additional surgery, and will cause plaintiff hereafter to become further hospitalized and to become further liable for hospital, doctors', surgeons', nurses', drug and other bills and expenses in an amount which is not presently known. When the reasonable cost of such bills and expenses is determined plaintiff will amend this complaint to allege the full extent thereof.

Wherefore, plaintiff prays judgment against defendants and each of them:

1. For the sum of \$75,000.00 as and for general damages.
2. For special damages for loss of earnings in the amount of \$1,890.00 and such amount as will compensate her for any additional loss of earnings.
3. For special damages for estimated expenses of plaintiff as the result of defendants' negligence in the amount of \$15,000.00, and in such additional amounts as plaintiff will incur for and in connection with further surgical, hospital and like treatment.
4. For costs of suit herein.
5. For such other and further relief as to the Court may seem proper.

Dated : December 9, 1957.

FREED & FREED,
/s/ By KURT W. MELCHIOR,
Attorneys for Plaintiff.

Plaintiff Requests That All Issues of Fact Herein
Be Tried by a Jury.

FREED & FREED,
/s/ By KURT W. MELCHIOR,
Attorneys for Plaintiff.

[Endorsed] : Filed December 26, 1957.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Come now the defendants Western Hotels, Inc., a corporation and E. B. DeGolia, and answering the complaint on file herein, admit, deny and allege as follows:

I.

Answering Paragraph I (b), these answering defendants allege that they have no information or belief sufficient to enable them to answer any or all of the allegations contained in that portion of Paragraph I of said complaint, and basing their denial upon the lack of such information or belief, deny said portion of said Paragraph I, both generally and specifically, and all the allegations therein contained.

Answering Paragraph I (c), these answering defendants admit that at all times therein mentioned defendant Western Hotels, Inc. was a corporation doing business in the State of California. Save and except as herein admitted, these answering defendants deny said Paragraph I (c) both generally and specifically and all the allegations therein contained.

II.

Answering Paragraphs IV, V, VI, VIII, IX, X, XI, and XII, these answering defendants deny the same, both generally and specifically, and all the allegations therein contained; deny that plaintiff was, or will be damaged in the sums of \$75,000.00, \$1540.00, \$350.00 and \$15,000.00, or in any other sum or sums or at all.

III.

Answering Paragraph XIII, these answering defendants allege that they have no information or belief sufficient to enable them to answer any or all of the allegations contained in Paragraph XIII of said complaint, and basing their denial upon the lack of such information or belief, deny said Paragraph XIII, both generally and specifically, and all the allegations therein contained.

As and for a Further, Separate and Distinct Affirmative Defense to the Complaint, these answering defendants allege that plaintiff was negligent in and about the matters referred to in said complaint and that such negligence on the part of said

plaintiff proximately and concurrently contributed to the happening of the accident and to the injuries, loss and damage complained of by plaintiff, if any there were.

Wherefore, these answering defendants pray that plaintiff take nothing by reason of the complaint; that defendants be awarded their costs of suit herein and such other and further relief as the Court deems just.

KEITH, CREEDE & SEDGWICK,
Attorneys for said Defendants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed January 29, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S JUROR'S QUESTIONS

1. Do any of you or members of your families work for or own stock in any hotel? Details.
2. Have any of you or members of your family ever sued or been sued over an accident or personal injury?
3. Have any of you or members of your family ever been involved in an accident resulting in a personal injury requiring hospitalization? Details.
4. Do any of you have any prejudice against women in professional or Government jobs?
5. Do or did any of you, or any members of

your family, work for or have any interest in the Royal Indemnity Company?

6. Have any of you served as members of a trial jury in this court within the past year?

Presented by Mr. Melchior.

[Endorsed]: Filed December 29, 1958.

[Title of District Court and Cause.]

**AMENDMENT TO ANSWER TO CONFORM
TO PROOF**

Come now the defendants above named and after leave of Court first obtained, do hereby amend the Answer to the Complaint heretofore filed, as follows:

I.

Answering Paragraph III of Plaintiff's said Complaint, these answering defendants deny the same, both generally and specifically, and all the allegations therein contained.

Wherefore, these answering defendants pray that plaintiff take nothing by her complaint; that defendants be awarded their costs of suit herein and such other and further relief as the Court deems just.

/s/ WALLACE E. SEDGWICK,
KEITH, CREEDE & SEDGWICK,
Attorneys for Defendants.

[Endorsed]: Filed January 7, 1959.

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTS TO CHARGE
NUMBERS 1 THROUGH 30

* * * * *

Plaintiff's Proposed Instruction No. 18

Contributory Negligence—Unanticipated Danger

Contributory negligence is not imputable to a plaintiff for failing to look out for a danger which she had no reasonable cause to apprehend.

Laird v. T. W. Mather, Inc., 51 A. C. 208 at 216.

Plaintiff's Proposed Instruction No. 19

Failure to Observe Obvious Danger

It is possible that you may find that the rug was in a dangerous condition, but that Mrs. Cohen might have seen the dangerous condition of the rug and thus have avoided the accident by stepping around it. But it does not follow from the fact that she might have seen this condition had she looked, that she was contributively negligent as a matter of law. All of the circumstances must be taken into account by you, and if you find that there was some reasonable excuse for a failure by Mrs. Cohen to observe danger from the rug, her conduct may be excused even though the danger was obvious. It was not necessarily negligent to fail to look for dangers in a hotel or business establishment when the ordinarily prudent person would not in fact expect to find the condition where it is, or where

she is likely to have her attention distracted as she approached it.

Laird v. T. W. Mather, Inc., 51 A. C. 208 at 215.

Plaintiff's Proposed Instruction No. 20
Contributory Negligence: Assumption That Way
Is Clear

Conceding for the sake of argument that, if Mrs. Cohen had looked down in front of her feet she might have noticed any dangerous condition of the rug, nevertheless you may find that in the circumstances she was reasonably justified in assuming that her way was unobstructed, and that her failure to see it was not necessarily negligence.

Laird v. T. W. Mather, Inc., 51 A. C. 208 at 216.

* * * * *

[Endorsed]: Filed January 7, 1959.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Defendant.

/s/ DAVID A. NICOLAIDES,
Foreman.

Filed January 7, 1957, at 2 o'clock and 30 minutes p.m.

C. W. CALBREATH,
Clerk,

/s/ By HOWARD F. MAGEE,
Deputy Clerk.

[Endorsed]: Filed January 7, 1959.

In the Southern Division of the United States District Court, Northern District of California

No. 36938-Civil

LUCY K. COHEN,

Plaintiff,

vs.

E. B. DeGOLIA,

Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on the 29th day of December, 1958, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Kurt W. Melchior, Esq., and Eli Freed, Esq., appearing as attorneys for plaintiff, and Wallace Sedgwich, Esq., and Scott Conley, Esq., appearing as attorneys for defendants, and the trial having been proceeded with on December 29 and 30, 1958, and January 6 and 7, 1959, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Defendant. David A. Nicolaides, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by rea-

son of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action, and that defendant go hereof without day, and that said defendant do have and recover of and from plaintiff his costs herein expended taxed at \$.....

Dated: January 8, 1959.

/s/ C. W. CALBREATH,
Clerk.

Entered in Civil Docket January 8, 1959.

[Endorsed]: Filed January 8, 1959.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Plaintiff moves the court to grant a new trial in the above captioned case, on the following grounds:

I.

The court committed prejudicial error of law at the trial.

II.

The court committed prejudicial error of law at the trial in the admission and exclusion of evidence.

III.

The court committed prejudicial error of law at the trial in excluding plaintiff's proffered expert testimony.

IV.

The court committed prejudicial error of law at the trial in permitting issues to be considered which were not reflected in the pleadings.

V.

The court committed prejudicial error of law at the trial in ordering defendant Western Hotels, Inc. dismissed from the case.

Wherefore, plaintiff prays that a new trial be granted herein.

Dated: January 14, 1959.

FREED & FREED,
/s/ By KURT W. MELCHIOR,
Attorneys for Plaintiff.

To Keith, Creede & Sedgwick, Attorneys for Defendant:

Please take notice that the plaintiff will bring the above motion on for a hearing before Honorable Willis W. Ritter, United States District Judge, at his courtroom, Room 276, United States Court House, 7th and Mission Streets, San Francisco, California, at 10:00 a.m. on Tuesday, January 27, 1959, or as soon thereafter as counsel can be heard.

FREED & FREED,
/s/ By KURT W. MELCHIOR,
Attorneys for Plaintiff.

Certificate of Mailing Attached.

[Endorsed]: Filed January 15, 1959.

United States District Court for the Northern
District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 27th day of January, in the year of our Lord one thousand nine hundred and fifty-nine.

Present: the Honorable Willis W. Ritter.

[Title of Cause.]

This case came on regularly this date for hearing on motion for new trial. Ordered after hearing, motion for new trial denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Lucy K. Cohen, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 8, 1959, and from the order of dismissal as to defendant Western Hotels, Inc. entered herein on January 6, 1959.

Dated: February 25, 1959.

FREED & FREED,
/s/ By KURT W. MELCHIOR,
Attorneys for Plaintiff.

[Endorsed]: Filed February 26, 1959.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

Appellant in the above-entitled matter intends to rely on the following points in the presentation of her appeal herein:

1. That the District Court erred in entering judgment for the defendants.
2. That the District Court erred in permitting defendants to amend their answer during the trial.
3. That the District Court erred in dismissing defendant Western Hotels, Inc., a corporation, from the case.
4. That the District Court erred in ruling on the admission and exclusion of evidence.
5. That the District Court erred in unduly restricting plaintiff's proofs.
6. That the District Court erred in excluding expert testimony offered by plaintiff.
7. That the District Court erred in excluding testimony offered by plaintiff as to the condition of a rug at the time of trial.
8. That the District Court erred in admitting testimony offered by defendants as to the condition of the same rug at the time of trial.
9. That the District Court erred in admitting testimony offered by defendants as to the absence of other accidents at the site of this accident.
10. That the District Court erred in excluding demonstrations offered by plaintiff.

11. That the District Court erroneously charged the jury about the law applicable to this case.
12. That the District Court erroneously charged the jury that negligence by defendants would have to be at the time of the accident to be actionable.
13. That the District Court erroneously refused to charge the jury on certain matters requested by plaintiff.
14. That the District Court erred in unduly curtailing examination of the jury panel on voir dire.

Dated: March 17, 1959.

FREED & FREED,
/s/ By KURT W. MELCHIOR,
Attorneys for Appellant.

Certificate of Mailing Attached.

[Endorsed]: Filed March 20, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by counsel for the appellant:

Excerpt from docket entries.

Complaint.

Answer to Complaint.

Amendment to Answer.

Plaintiff's Requests to Charges Nos. 1 through 30.

Requests for Questions to Be Asked of Jury Panel.

Verdict.

Judgment.

Motion for New Trial.

Minute Order Denying Motion for New Trial.

Notice of Appeal.

Appeal Bond.

Appellant's Designation of Record on Appeal.

Stipulation to Amend Designation.

Statement of Points Upon Which Appellant Intends to Rely on Appeal.

Order Extending Time to Docket Record on Appeal.

Reporter's Transcript of Record on Appeal.

Plaintiff's Exhibits: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 10-A, 11, 12, 13, 14, 15, 16, 17 and 18.

Defendant's Exhibits A, B, C, D, and E.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 1st day of May, 1959.

[Seal]

C. W. CALBREATH,

Clerk,

/s/ By MARGARET P. BLAIR,

Deputy Clerk.

In the District Court of the United States, Northern
District of California, Southern Division

No. 36,938

LUCY K. COHEN, Plaintiff,
vs.

WESTERN HOTELS, INC., and E. B. DeGOLIA,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: Hon. Willis M. Ritter, Judge.

Appearances: For the Plaintiff: Messrs. Freed & Freed, by Kurt W. Melchior and Eli Freed. For the Defendant: Messrs. Keith, Creede & Sedgwick, by Wallace Sedgwick, Scott Conley. [1]*

December 29, 1958, et seq.

The Court: All right. You may fill the jury box.

(Whereupon the following prospective jurors were seated in the jury box in the order named, and sworn:)

* * * * *

The Court: You have been called into the jury box this morning, Ladies and Gentlemen, to try the case of Lucy K. Cohen, plaintiff, against the Western Hotels, Inc., and E. B. DeGolia.

The plaintiff here claims that the defendants were negligent in that they maintained a rug on the floor

* Page numbers appearing at top of page of Reporter's Transcript of Record.

of the lobby of the Hotel Maurice in such fashion that she was caused [3] to fall and injure herself, and she seeks damages.

I mention that much about the case for the purpose of asking you folks if you have heard about this matter before you came here this morning. Have any of you heard about this case?

(No audible response.)

Do any of you know any of the people at counsel table? Plaintiff and her counsel sit at the nearest counsel table and defendant at the far counsel table. Have any of you any connection with the Western Hotels, Inc., or the Hotel Maurice? Yes, sir?

Mr. Harris: I travel on the road and I have stayed at the Maurice many times.

The Court: You have stayed at that hotel many times?

Mr. Harris: Yes.

The Court: Step down, please.

(Mr. Harris excused. Hartwell C. Kennedy called to the jury box, sworn.)

The Court: Do you know any of the folks at counsel table?

Mr. Kennedy: No, sir.

The Court: Have you had any connection with the Hotel Maurice or Western Hotels, Inc.?

Mr. Kennedy: No. [4]

The Court: Now, let's get your occupations, please, starting with Juror No. 1.

Mr. Kennedy: Laboratory assistant.

Mr. Sedgwick: I am sorry, I can't hear.

Mr. Kennedy: Senior laboratory assistant.

The Court: Next?

Mr. Lowe: Pacific Gas and Electric Company janitor.

The Court: Next?

Mr. Perlee: Safety engineer specializing in boilers.

Mr. Davis: I am with the Associated Student School in Berkeley. I don't know whether this is the proper time, but I would like to ask for a postponement of this duty, if I may, as our current inventory is going on.

The Court: Well, we will see about that. What is your occupation?

Mr. Carpenter: Consulting engineer.

The Court: Next?

Mrs. Ostrander: Housewife.

Mr. Fiedler: Distributor of Signal Oil products.

Mr. Baker: Construction estimator.

Mr. Nicolaides: General contractor, Burlingame, California.

Mr. Manasse: Self-employed. I am retired. [5]

The Court: What did you do before you retired?

Mr. Manasse: I was a manufacturer of ladies' coats.

The Court: Next?

Mrs. Lucien: Clerk with the Internal Revenue Service.

The Court: Next?

Mr. Novell: Tavern owner.

The Court: Have any of you folks ever been involved in any kind of personal injury action? Yes, sir?

A Juror: I have a lawsuit against me.

The Court: For personal injuries?

A Juror: For personal injuries, yes.

The Court: How did it arise?

A Juror: We won the case.

The Court: What was it, an automobile case?

A Juror: It was a salesman who was hurt in the establishment.

The Court: How was he hurt?

A Juror: I don't know, but I know he claimed he was hurt, but he lost the case.

The Court: Maybe he wasn't hurt.

A Juror: I guess so.

The Court: Do you think that circumstance would affect your judgment one way or the other in this lawsuit? [6]

A Juror: I don't believe so.

The Court: I will say to you, Ladies and Gentlemen, that if you are selected on this jury it will be your duty to try these issues fairly and impartially without any bias or prejudice, any sympathy or passion of any kind or nature whatsoever. It will be your duty under your oaths to try these issues on the evidence which will be received here in the form of testimony from sworn witnesses and perhaps from exhibits in the case, and you are to decide these issues on that evidence and that evidence alone, paying heed, of course, to the instructions which the Court will give you with respect to the law.

Is there any of you here for any reason of any character at all of which you now think who feels

he or she cannot perform this jury duty as I have just instructed you it will be your duty to do?

(No audible response.)

The Court: Is there any circumstance of any kind that you think might embarrass you or that you think might affect your judgment so that you could not decide the case fairly and impartially from the evidence?

(No audible response.)

The Court: All right, gentlemen, do you have any suggestions?

Mr. Melchior: I left some questions with the Clerk, your Honor.

The Court: Yes. Well, I never give them when they are handed up to me. I try to handle the thing in a general kind of way. If you have anything in particular you want me to ask them about, I will see about it.

Mr. Melchior: I would like to know how the jurors feel about women in professional capacities and in Government jobs?

The Court: No, I am not going to ask that specifically. I have told them they are not to have any bias or prejudice, and that they are to decide this case on the evidence only and lay aside any passion, prejudice or sympathy.

Mr. Sedgwick: I have no suggestions, your Honor.

The Court: Exercise your challenges.

Mr. Melchior: Plaintiff will excuse Mr. Novell.

(Ralph J. Novell excused. Frederick L. Winson called to the jury box and sworn.)

The Court: I assume you have been in the court

room all the time I have been talking to this jury, is that correct?

Mr. Winson: Yes, sir.

The Court: Have you heard what the Court has had to say?

Mr. Winson: Yes, sir.

The Court: Do you know anybody at counsel table? [8]

Mr. Winson: I have met Mr. Sedgwick in business years ago.

Mr. Sedgwick: Yes, your Honor.

The Court: How well do you know Mr. Sedgwick?

Mr. Winson: Not well.

The Court: Did he ever do any work for you or your firm?

Mr. Winson: No, sir.

The Court: Do you think your acquaintance with counsel is such that you could not fairly and impartially try these issues from the evidence?

Mr. Winson: I do not.

The Court: What is your occupation?

Mr. Winson: Realtor.

The Court: All right, gentlemen.

Mr. Melchior: I would like to know under what circumstances the gentleman met Mr. Sedgwick.

The Court: Yes, tell us about that.

Mr. Winson: We talked about moving his offices. We didn't do it.

The Court: That was in relation to your real estate business?

Mr. Winson: That's right, sir.

The Court: How long ago was that?

Mr. Winson: A year and a half. [9]

Mr. Sedgwick: I think it was about twice that long.

Mr. Winson: It was.

The Court: Well, all right. Do you have any other suggestions?

Mr. Melchior: No, your Honor.

The Court: Exercise your challenge.

Mr. Sedgwick: We will excuse Mr. Perlee, your Honor, please.

(Melvin S. Perlee excused. Lillian H. Henderson called to the jury box, sworn.)

The Court: What is your occupation?

Mrs. Henderson: Housewife.

The Court: What does your husband do?

Mrs. Henderson: He is division manager for a large trucking concern.

The Court: You have been in the courtroom while the Court has been questioning the jurors?

Mrs. Henderson: Yes, I have.

The Court: You heard what I said to them?

Mrs. Henderson: Yes, sir.

The Court: Have I mentioned anything that you think might affect your judgment one way or the other?

Mrs. Henderson: No, sir.

The Court: You heard the Court say it would be [10] your duty to try the issues fairly and impartially, laying aside all passion and prejudice and sympathy?

Mrs. Henderson: Yes, sir.

The Court: And decide this case only on the evidence that will be received here?

Mrs. Henderson: Yes.

The Court: Do you know any of the people at counsel table?

Mrs. Henderson: No, sir.

The Court: Ever been around the Maurice Hotel?

Mrs. Henderson: No, sir.

The Court: Has anyone else on this jury ever been around the Maurice Hotel, been a guest there? Or are any of you connected with the Western Hotels Corporation?

(No audible response.)

The Court: All right.

Mr. Melchior: If your Honor please, your Honor has not inquired of the jurors with respect to the other defendant, Mr. DeGolia.

The Court: What is his relation?

Mr. Melchior: He is the owner of the hotel.

The Court: Do you know Mr. E. B. DeGolia, who is said to be the owner of the Maurice Hotel?

A Juror: I met him some years ago.

The Court: How long ago? [11]

A Juror: Four years ago, five years ago.

The Court: Is your acquaintanceship with him such that you think your judgment might be affected one way or the other in this case for or against the plaintiff or for or against the hotel?

A Juror: It is not.

The Court: All right.

Mr. Melchior: We will excuse Mr. Winson.

(Frederick L. Winson excused. Vincent B. Johnson called to the jury box, sworn.)

The Court: Have you been in the courtroom while the court has been questioning the jury?

Mr. Johnson: Yes.

The Court: You have heard what I have had to say, is that correct?

Mr. Johnson: Yes.

The Court: What is your occupation?

Mr. Johnson: Manufacturer's representative, contractor.

Mr. Sedgwick: I am sorry, I didn't hear.

The Court: Manufacturer's representative and contractor. What company do you represent?

Mr. Johnson: Vince Johnson Metal Specialties.

The Court: Have you ever been in the Maurice Hotel? [12]

Mr. Johnson: No.

The Court: Are you connected with now or ever been, with the Western Hotels, Inc., the Maurice Hotel or Mr. E. B. DeGolia, who is said to be the owner of the hotel?

Mr. Johnson: No.

The Court: Are you acquainted with anybody at counsel table?

Mr. Johnson: No.

The Court: Ever been engaged in any kind of personal injury lawsuit?

Mr. Johnson: No.

The Court: Has anybody else here? Yes?

A. Juror: Automobile accident. I was defendant.

The Court: In an automobile accident?

A Juror: Yes, sir.

The Court: Anyone else been involved in a lawsuit arising from personal injury?

(No audible response.)

The Court: Do you folks think that your experiences in that lawsuit would affect your judgment one way or the other in this one? Do you think you might be biased or prejudiced either for or against the plaintiff or for or against the defendant in this case?

A Juror: No. [13]

The Court: No. 7, I wish you would speak audibly so the Court Reporter can get it. Do you think you can sit in this case and render a fair and impartial judgment?

Mr. Fiedler: Yes, I do.

The Court: What is that?

Mr. Fiedler: Yes, I can render a judgment.

Mr. Sedgwick: I am sorry, I didn't hear.

The Court: He said he thought he could sit in this case and render a judgment fairly and impartially, without any bias or prejudice of any kind or nature. Is that correct, Mr. Baker?

Mr. Baker: That is correct.

The Court: All right. Exercise your challenge.

Mr. Sedgwick: We will excuse Mr. Manasse, Juror No. 10.

(Herbert L. Manasse excused. Rose M. Cohn, called to the jury box, sworn.)

The Court: What is your occupation?

Mrs. Cohn: Housewife.

The Court: What does your husband do?

Mrs. Cohn: Moving picture operator.

The Court: Do you know any of the folks at counsel table?

Mrs. Cohn: No, sir.

The Court: Are you acquainted with the Maurice Hotel? [14]

Mrs. Cohn: No, sir.

The Court: Have you ever been connected with Western Hotels, Inc.?

Mrs. Cohn: No.

The Court: Do you knoow Mr. E. G. DeGolia?

Mrs. Cohn: No.

The Court: Have you been in the courtroom while the court has been talking to the jurors?

Mrs. Cohn: Yes.

The Court: Did you hear what the Court said?

Mrs. Cohn: Yes, sir.

The Court: Any reason why you can't sit in this trial and render a fair and impartial verdict?

Mrs. Cohn: I have had a personal injury, an automobile accident.

The Court: Do you think that would affect your judgment one way or the other?

Mrs. Cohn: No.

The Court: Were you seriously hurt?

Mrs. Cohn: Well, not too bad, but then I didn't come to court at all.

The Court: I will ask all of you, each and every one of you, this question again: Is there any reason at all of which you are now conscious which you presently think [15] might affect your judgment

one way or the other in this lawsuit so that you could not fairly and impartially try the issues on the evidence?

(No audible response.)

The Court: All right, gentlemen.

Mr. Melchior: The plaintiff will excuse Mr. Fiedler, Juror No. 7.

(Arthur W. Fiedler excused. Theresa K.

Moran called to the jury box, sworn.)

The Court: Have you been in the courtroom while the Court has been questioning the jury?

Mrs. Moran: Yes.

The Court: Have you heard what I said?

Mrs. Moran: Yes.

The Court: Are you acquainted with anybody at the counsel table?

Mrs. Moran: No, sir.

The Court: Are you acquainted at all with the Hotel Maurice?

Mrs. Moran: No, I am not.

The Court: Or the owner, Mr. DeGolia?

Mrs. Moran: No.

The Court: Have you ever been involved in a personal injury action?

Mrs. Moran: I haven't. [16]

The Court: Any reason why you can't sit fairly and impartially and decide this case on the evidence?

Mrs. Moran: No.

The Court: What is your occupation?

Mrs. Moran: Housewife.

The Court: Your husband?

Mrs. Moran: He is Business Administrator at the

Laguna Honda Home, the City and County of San Francisco.

The Court: All right, gentlemen. The plaintiff has exhausted his challenges.

Mr. Sedgwick: We will excuse Mrs. Cohn, if your Honor please.

(Rose M. Cohn excused. Sheldon D. Smith called to the jury box, sworn.)

The Court: What is your occupation?

Mr. Smith: I am with Pan American Maintenance Schedule.

The Court: Do you know any of the folks at counsel table?

Mr. Smith: No, I do not.

The Court: Have you heard of this action before?

Mr. Smith: No.

The Court: Are you acquainted with the Maurice Hotel or its proprietor?

Mr. Smith: No. [17]

The Court: Is there any reason why you think you could not decide the issues fairly and impartially, without bias or prejudice, for or against this plaintiff or for or against the defendant?

Mr. Smith: No.

The Court: All right. Swear the jury.

(Thereupon, the jury was sworn and an opening statement was made by counsel for the plaintiff.)

Mr. Sedgwick: If your Honor please, may we reserve our opening statement until the close of the plaintiff's case?

The Court: You may. Call your witness.

GENE MAURA COHEN

called as a witness on behalf of the plaintiff, sworn.

Direct Examination

The Clerk: Please state your name, your address and your occupation to the court and to the jury.

The Witness: Gene Maura Cohen, 2827 Hurst Terrace, N.W., Washington, D. C.

Q. (By Mr. Melchior) : Have you an occupation ?

A. Yes. I am a student.

Q. Miss Cohen, how old are you ?

A. I am 19 years old. [18]

Q. What is your occupation, again ?

A. I am a college student.

Q. Where ?

A. At the University of Rochester in New York State.

Q. Are you related in any way to Mrs. Cohen, the plaintiff in this action ?

A. I am her daughter.

Q. Calling your attention to October 14, 1957, do you recall that date? A. Yes, I do.

Q. Where were you at or about 7 o'clock in the morning of that day ?

A. We were in the Hotel Maurice in San Francisco.

Q. How did you happen to be there ?

A. We were staying in San Francisco at the close of a trip which my mother and I had made for the past week. I had been working and studying in Albuquerque, New Mexico, for the summer,

(Testimony of Gene Maura Cohen.)

because I wanted to find out whether this was the place I wanted to work. My father had done most of his work among the Indians of the Southwest and I wanted to do so also. My mother came to meet me at the end of this two months' period that I was in Albuquerque, and together we were going to make a trip to some places we had visited with my father.

Mr. Sedgwick: May I interrupt, counsel? I have difficulty hearing this witness. May I ask Miss Cohen to speak louder? [19]

The Court: Of course. Unfortunately the acoustics aren't too good in this courtroom. If you will try to lift your voice a little, Miss Cohen.

The Witness: I will try to speak louder. Would you like me to repeat anything I have said?

The Court: No. That is all right.

The Witness (Continuing): Well, we had made a trip for a week together by bus from Albuquerque, New Mexico, to San Francisco, revisiting some of the places we had visited with my father seven years before. We arrived in San Francisco the night before, and our plan was to leave next morning in order to meet my sister, who was finishing work at a music camp on the East Coast.

Q. (By Mr. Melchior): Where were you staying in San Francisco?

A. At the Maurice Hotel.

Q. How long had you been at the Maurice Hotel?

A. We arrived in San Francisco at about 5

(Testimony of Gene Maura Cohen.)

o'clock the night before the accident occurred and checked into the Maurice Hotel.

Q. Had you ever been to the Maurice Hotel before? A. No, sir.

Q. Now, do you recall what the lobby of the Maurice Hotel looked like at 7 o'clock in the morning of August 14, 1957? [20] A. Yes, I do.

Q. Will you tell the jury what the lobby looked like at that time?

A. Well, as you come down the elevator from the upstairs, you arrive in a lobby. The desk is to the left in the back of the lobby. The elevators are on the rear floor of the lobby, on the left side.

As you come out of the elevator you are in the main part of the lobby looking towards the doors on the street.

This lobby has in the center of it two pillars for support, and on the floor are two rugs, one on the near side of the pillars and one on the far side.

Q. Will you describe to us the kind of rugs that were in the lobby that morning?

A. Well, it was not wall-to-wall carpeting. They were separate rugs.

Q. Now, who arrived in the lobby first; you or your mother?

A. My mother was in the lobby before I was.

Q. Then shortly after 7 o'clock did there come a time when you arrived in the lobby?

A. That is correct.

Q. From where did you arrive in the lobby?

A. I came down from our room upstairs on the

(Testimony of Gene Maura Cohen.)

elevator. [21] My mother was waiting in the lobby for me.

Q. And what happened next?

A. Well, we began to walk towards the cab which was parked in front of the door in the street.

Q. Describe the route that you took, where you walked and where your mother walked.

A. Well, we walked through the main part of the lobby between these two pillars, which is where most of the traffic takes place in the lobby of the hotel. My mother was preceding me by about three steps, walking towards the cab.

Q. Do you recall what your mother was wearing and carrying at the time?

A. Yes, I do. She was wearing a gray, two-piece dress with a jacket, regular black shoes, a woman's pocketbook and a small bag on her arm.

Q. And as you walked through the lobby did anything unusual occur?

A. Yes. As we got to the edge of the second rug in the front of the lobby my mother's toe caught in one of the folds of the rug, and she pitched forward and tried to keep her balance, kept walking forward as she was trying to keep her balance, and she wasn't able to regain it, and sprawled in the doorway and hit her knee against the doorsill of the entrance.

Q. Did you see this happen? [22]

A. Yes, I did.

Q. Where were you at the time that this happened?

(Testimony of Gene Maura Cohen.)

Q. Where were you at the time that this happened?

A. I was behind my mother, and when I saw her begin to trip I suppose I couldn't move for the first second or so because my reaction was slow, and then I tried to go around to the side so I could catch her from the front, but I wasn't able to do this in time and she fell before I could get there.

Q. Will you describe your mother's conduct at the instant that her foot caught as you have described it?

A. Well, she was walking in a normal manner and then pitched forward. She tried to catch herself, but couldn't and fell.

Q. And did you see where she landed and with what part of her body she landed?

A. I said she landed in the doorway with her knee hitting the doorsill as she landed there. [23]

* * * * *

Q. Now, calling your attention to the morning after the accident, August 15, 1957, did you return to the Maurice Hotel that morning?

A. Yes, I did.

Q. And who was with you?

A. You were and the photographer, Mr. Lohman. [25]

* * * *

Q. (By Mr. Melchior): Miss Cohen, before recess you said on the morning after the accident you returned to the hotel, and who was present with you?

(Testimony of Gene Maura Cohen.)

A. You were and the photographer, sir.

Q. At that time were photographs of the lobby taken? A. That is correct.

Q. Did you have any part in the taking of those photographs? A. Yes, I did.

Q. What did you do?

A. I showed you and the photographer the condition of the rug at the time of my mother's accident.

Q. When were the pictures taken with respect to your demonstration?

A. These were taken after I had showed you what the rug looked like just at the time of the accident. [26]

The Clerk: Plaintiff's Exhibits 1, 2, 3 and 4 marked for identification.

(Photographs marked Plaintiff's Exhibits 1, 2, 3 and 4 for identification.)

Q. (By Mr. Melchior): Miss Cohen, I will show you Plaintiff's Exhibit 1 and ask you if you recognize it.

A. Yes, I do. This is the lobby of the Hotel Maurice looking out toward the street doors.

Q. Now, can you tell us whether or not that is a likeness of the scene as it was photographed on the morning of August 15, 1958? A. Yes.

Mr. Sedgwick: Just a moment, your Honor, I object to that as immaterial as to what it looked like on August 15th. If she testified that is the way it looked as she saw it before the accident, I would have no objection.

(Testimony of Gene Maura Cohen.)

Mr. Melchior: She has already testified on that morning she made a point of reconstructing the accident—reconstructing the lobby as it was at the time of the accident.

Mr. Sedgwick: I am not sure I understood. Did you say "reconstruct"?

The Court: Yes, he says this lady had a part in fixing the lobby, reconstructing it so that it looked like it did on the morning of the accident and then they made the photographs. [27]

Mr. Sedgwick: I withdraw my objection, your Honor.

Q. (By Mr. Melchior): Is this a picture taken at that time? A. That's right.

Q. Is that how the lobby looked on the morning of the accident, just at the time of the accident?

A. Yes, it is.

Q. I will show you Plaintiff's Exhibit 2 for identification and ask you what that is.

A. This is a closeup of the rug in question and the front of the lobby of the hotel.

Q. And can you state the circumstances under which this picture was taken?

A. This picture was taken at the same time.

Q. And can you state whether or not this was also done pursuant to your reconstruction of the scene of the accident at the time of the accident?

A. Yes, that is correct.

Q. Is it such a reconstruction? A. Yes.

Q. I will show you Plaintiff's Exhibit 3 for identification and ask you what that is.

(Testimony of Gene Maura Cohen.)

A. This is a closeup shot of the doorsill at the front of the hotel, on which my mother's knee hit as she fell.

Q. When was this picture taken? [28]

A. This was taken at the same time, the day after the accident.

Q. And is that also a reconstruction exactly of how that part of the lobby appeared at the time of the accident? A. Yes.

Q. I will show you Plaintiff's Exhibit 4 for identification and ask you what this is.

A. This is a closeup of the rug as it looked when we reconstructed to appear as it did at the time of the accident.

Q. I will ask you with respect to Plaintiff's Exhibits 1, 2, 3 and 4 whether these are pictures of the scene of the accident exactly as it appeared at the time of the accident.

A. Yes, as nearly as I could reconstruct it.

Mr. Melchior: I offer in evidence Plaintiff's Exhibits 1, 2, 3 and 4.

Mr. Sedgwick: No objection.

The Court: Received.

(Plaintiff's Exhibits 1, 2, 3 and 4 for identification were received in evidence.)

Q. (By Mr. Melchior): Miss Cohen, I am going to hand you a pencil and ask you to mark on the photographs the edge of the rug at the point where your mother fell and to mark the place where she landed after the fall.

(Testimony of Gene Maura Cohen.)

Mr. Sedgwick: Excuse me, your Honor, may I step over here? [29]

The Court: Surely. Has counsel seen these?

Mr. Sedgwick: Yes.

The Witness (Indicating): This is the general area.

Q. (By Mr. Melchior): Mark an "X" at that point.

Mr. Sedgwick: May I ask what "X" is supposed to represent?

Mr. Melchior: Put your initials by this.

(Witness marking photographs as requested.)

Mr. Melchior: Plaintiff has marked Exhibit 2 as the place where—what happened?

The Witness: This is approximately the place where my mother's toe caught in the rug and where she tripped. Do you want me to also mark the place where she landed?

Mr. Melchior: Well, I think you can mark that on some other picture.

The Court: All right. Now what do you want her to do?

Mr. Melchior: I want her to mark the other picture, where she landed. This is on Plaintiff's Exhibit 3.

The Witness: This would be approximately where her knee landed.

(Exhibits handed to the jury.)

Q. (By Mr. Melchior): Miss Cohen, at the time these pictures were taken did anyone come over to join the party, you, the photographer and me? [30]

(Testimony of Gene Maura Cohen.)

A. Yes, the bellman did. He came over there.

Q. How did you know it was a bellman?

A. It was the same person who had carried our bags and assisted us the night before and that morning when we were checking out.

Q. And how was he dressed?

A. In a regular bellman's uniform with the name of the hotel on it.

Q. At that time was there anyone else present other than yourself and the photographer and the bellman and I?

A. No, these were the only people around.

Q. Was anything said at that time, and state who said what?

Mr. Sedgwick: Just a minute. I am going to object to a general question of that kind on the ground that it calls for hearsay and is plainly self-serving.

Q. (By Mr. Melchior): Let me ask you this: Did the bellman say anything at that time?

A. Yes.

Mr. Sedgwick: Just a moment. We will object to that without a proper foundation, your Honor.

The Court: Yes. Lay your foundation, counsel, that is, when and where and who was present.

Mr. Melchior: I think that's in the record, your Honor.

Q. What time did this happen and what place?

A. This was in the lobby of the Hotel Maurice on the morning after the accident occurred. It was

(Testimony of Gene Maura Cohen.)

about 10:30 or 11:00 o'clock in the morning, and the people that I have named were in the party.

The Court: Who were they?

The Witness: You (indicating Mr. Melchior) and the photographer and myself, and at that time we were joined by the bellman who came over to our party.

The Court: Don't tell us yet what he said.

Mr. Sedgwick: If your Honor please, can we know the bellman's name and the photographer's name?

Q. (By Mr. Melchior): Do you know the bellman's name?

A. The bellman's name was Mr. Carter and the photographer is Mr. Lohman.

Q. Do you know my name?

A. Mr. Melchior.

Mr. Sedgwick: I didn't get the photographer's name.

The Court: Lohman.

Mr. Melchior: L-o-h-m-a-n.

Q. What, if anything, did the bellman say at that time?

A. The bellman came to the place where our party was and said, "Well, if it makes any difference, I make a point of watching this rug and seeing that when it gets bunched up it does not stay in a dangerous condition."

Q. Did anyone else say anything at that point?

A. After he volunteered this information [32] Mr. Melchior asked him if this happened—

(Testimony of Gene Maura Cohen.)

Mr. Sedgwick: Just a moment. Are you going to testify to something Mr. Melchior said?

Mr. Melchior: Don't say what I said. Did I say something?

The Witness: Yes.

Q. (By Mr. Melchior): And as a result of that did the bellman say anything else?

A. Yes. The bellman said, "This happens pretty regularly, and I make a point of watching it regularly and straighten it out when it bunches up in a dangerous condition."

Mr. Sedgwick: Just a moment. May I move to strike the "dangerous condition" unless she says it is what the man said?

The Witness: Yes, this is what the bellman said.

Mr. Sedgwick: All right.

Q. (By Mr. Melchior): Did anyone else say anything? Don't state what was said, but just state whether anyone else said anything else after the bellman made that last statement.

A. Not to the bellman.

Q. Did the bellman say anything after that?

A. Yes. He said that when a man's heel catches on the rug the edge of the rug may be raised.

Q. Did he say anything else after that? [33]

A. He said that that happens pretty regularly, that the carpet can become raised.

Q. Did he say anything else after that?

A. Perhaps in answer to further remarks by our party, but I don't remember anything else.

Q. Now, can you describe the type of life with

(Testimony of Gene Maura Cohen.)

respect to physical activity that your mother lived just prior to August 14, 1957?

A. Yes. My mother has led a very active life for as long as I can remember, and she has participated in physical activities such as tennis, swimming, hiking, mountain climbing and boating. She did a great deal of walking. She did gardening, in which she had to bend over and use her hands and knees. And the same thing with some housework. She led a very active life.

Q. And can you state of your own knowledge what kind of a life your mother is leading now with respect to these things?

A. From what I can observe, her activities are markedly limited now. She can no longer participate in any of these activities such as swimming or hiking or mountain climbing, which are so much a part of her life. Even walking to any degree is not comfortable for her. Sitting for long periods of time in travel is not comfortable.

She can't paint any longer. She used to do some amateur painting. And she can't stand on her feet for long [34] periods of time. She can no longer do the gardening or any sort of housework which requires bending or getting down on one's hands and knees.

Mr. Melchior: Cross-examine.

Cross-Examination

Q. (By Mr. Sedgwick): Miss Cohen, did I understand correctly that on the morning after this

(Testimony of Gene Maura Cohen.)

accident you went back to the Maurice Hotel accompanied by your attorney, Mr. Melchior, and a photographer by the name of Lohman?

A. That is correct.

Q. And while there you took and fixed these rugs in the condition shown in these photographs?

A. That is correct.

Q. So you attempted, did you, to put the rugs in the condition that you had seen them before this accident on the morning before? Is that correct?

A. I put them in the condition that I observed them immediately following the accident. I hadn't looked at the rug before the accident, but immediately following the accident, while my mother was still on the ground, I went to see what the trouble was that had caused this accident. From the way I saw these rugs then, we reconstructed them next day.

Q. Then you reconstructed them from your observation of the condition of the rugs after the accident and not before? [35]

A. Immediately following the accident, that is correct, sir.

Q. So that as you walked across the lobby there that morning three paces behind your mother you didn't observe the rugs in the condition as shown in this photograph, did you?

A. I observed her foot catch in the rug. I hadn't looked at the rug before she approached it.

Q. Miss Cohen, when you observed your mother's foot catch in the rug was it in the condition as

(Testimony of Gene Maura Cohen.)

shown in the photographs or not, can you tell us?

A. It was approximately in that condition. I can't tell, of course, whether we have reproduced exactly the same way it was.

Q. What I am asking you Miss Cohen, is whether you observed the rugs in the condition as shown in these photographs before your mother tripped or afterwards.

A. I observed it at the moment that she tripped. I didn't observe it before. I went back to look at them afterwards.

Q. All right. Now, at the moment she tripped did you observe it to be in the condition, say, as shown in Plaintiff's Exhibit 4?

A. I observed a fold in the rug in which her foot caught, sir. I didn't look at the whole rug to see how many folds there were, or anything of that sort.

Q. Do I understand you now, Miss Cohen, to say that you observed a fold in the rug before your mother fell? [36]

A. No, sir. I observed her foot catching on the rug.

Q. Did you observe a fold in the rug?

A. Yes, I observed this fold as her foot caught in it.

Q. Do you know whether or not the fold was caused by your mother's foot or whether the fold was there before your mother reached the rug? Can you answer that question?

A. Would you repeat the question?

(Testimony of Gene Maura Cohen.)

Mr. Sedgwick: Certainly.

(Question read by the reporter.)

The Witness: I don't know how it could be caused by her foot. I observed it at the moment her foot caught in it.

Q. (By Mr. Sedgwick): Were you watching your mother's feet at the time?

A. I was watching my mother. She was ahead of me, sir.

Q. All right. When did you first talk to Mr. Melchior or anyone in his office?

A. I believe we talked with them the evening of the day the accident occurred?

Q. August 14th? A. That's right.

Q. When was the operation on your mother's knee?

A. It was that evening, August 14th.

Q. Was it before or after the operation that you talked to Mr. Melchior?

A. I don't recall, sir. [37]

Q. What time was your plane to leave that morning? A. At 8:45.

Q. And were you going to take the limousine down?

A. We had called a taxi and our bags were in the taxi to go to the airport.

Q. Had you made arrangements to take the regular airport limousine?

A. No. We had a taxi.

Q. Do you know what time the airport limousine was supposed to leave?

(Testimony of Gene Maura Cohen.)

A. I don't know anything about an airport limousine, sir.

Q. Your recollection is that you never had an intention of taking the airport limousine? Do I quote you correctly?

A. Not that I recall. We had our taxi.

Q. Who called the taxi?

A. I believe the hotel called it for us.

Q. And was the reason that you called a taxi that you were to late to make the limousine?

A. Sir, I never take an airport limousine. I don't know. We had no intention of taking the airport limousine.

Q. Now, about how wide would you say that this rug is that your mother tripped on?

A. I would say it is about 9 feet wide from the edge to the doorway. Is that what you mean?

Q. Yes, the width of the rug. [38]

A. Yes.

Q. The length of it is about 30 feet, is it not?

A. That is correct.

Q. Now, was the first time your mother's knee touched the floor or the ground or the rug when it reached the marble portion between the rug and the front door?

A. I would assume so. I don't remember seeing exactly what happened. At a time something like that happens you don't observe every little thing that happens.

Q. You do recall, at least, your mother's knee did hit on the marble and not on the rug?

(Testimony of Gene Maura Cohen.)

A. That is correct.

Q. You recall that definitely, do you? Is that correct?

A. Yes, because I can recall the place where she fell.

Q. Was she partially out the door at the time she landed? A. Yes, she was.

Q. That was the left-hand door as you are facing the street? A. That is correct.

Q. How far out the door did she go?

A. I don't know that measurement in feet. She was partially out the door. Her head and shoulders and waist were out the door.

Q. Did anyone help you fix up this rug for the photographer to take these pictures or did you do that all by yourself?

A. I did this myself. [39]

Q. Did Mr. Melchior help you at all?

A. Possibly he did help me reconstruct this, but it was to my specifications.

Q. In other words, you and Mr. Melchior were down on the floor there and fixed it up the way you recalled seeing it?

A. It didn't require getting down on the floor, sir. Merely lift it with your toe. It came up very easily.

Q. I see. But you did have to lift it with your toes? A. That is correct.

Q. And both of you worked on that, did you?

A. Yes.

(Testimony of Gene Maura Cohen.)

Q. Was anyone else present besides the photographer at the time you were doing that?

A. There were other people in the lobby. The bellman was there. They weren't with us.

Q. Now, you state you recall the bellman—what did you say his name was? A. Carter.

Q. Carter. —came over after you had taken the pictures or before?

A. I don't recall whether we had taken the pictures yet. I believe it was before, but I couldn't be certain.

Q. And he said to you as you were scuffing this rug up so that you could take these pictures, "I make a point of watching this rug"? Do you remember that statement? [40]

A. That's right.

Q. Were those his exact words?

A. As near as I can remember them. He came over to us and said, "Well, if it makes any difference, I make a point of watching and seeing that when this rug gets bunched up it will not remain or stay in a dangerous condition."

Q. He used the term "dangerous condition," did he? A. Yes, he did.

Q. You distinctly remember that?

A. I distinctly remember that.

Q. And he said, "This happens regularly"?

A. Yes, sir. That's right. Those were the words he used.

Q. Did he say what "this" means? Did he mean that somebody falls down or—

(Testimony of Gene Maura Cohen.)

A. He was referring to the bunched-up rug—the bunching above the rug.

Q. He said, "This happens all the time"?

A. No, he used the words "pretty regularly."

Q. You recall that very definitely?

A. Yes.

Q. Did you make any notes of that conversation?

A. No, I did not.

Q. Did anyone else make any notes of it?

A. I believe somebody else in the party did.

Q. Who? [41] A. Mr. Melchior.

Q. And have you seen those notes?

A. Yes, I have had a chance to see those notes.

Q. When did you last see them?

A. Two days ago.

Q. Did you refresh your memory from those notes in order to testify here this morning?

A. Yes, I did.

Mr. Sedgwick: May I see those notes, counsel? For the record, counsel has handed me, your Honor, a piece of yellow paper purportedly containing notes made in your presence, Miss Cohen, on the morning you took the photographs, or on August 15, 1957; is that correct?

The Witness: That is correct.

The Court: Answer audibly.

The Witness: I said that is correct.

Mr. Sedgwick: I am sorry. I didn't hear.

The Witness: I said that is correct.

Mr. Sedgwick: May I have a few moments to look at my notes, your Honor?

(Testimony of Gene Maura Cohen.)

The Court: Certainly. We will recess while you are doing that.

Ladies and gentlemen, while at recess remember the admonition not to discuss the case among yourselves, not to let anyone else discuss it with you, and don't form or express an [42] opinion until the case is finally submitted to you.

We will recess until two o'clock.

(Thereupon an adjournment was taken until 2:00 o'clock p.m. of this date.) [42-A]

Afternoon Session, December 29, 1958
2:00 O'Clock P.M.

GENE MAURA COHEN

Further Cross-Examination

Mr. Sedgwick: Proceed, your Honor?

The Court: Yes.

Q. (By Mr. Sedgwick): I show you a piece of yellow paper with some writing on it, ask you if those are the notes that you refreshed your memory on before you came to court?

A. Yes, these are the notes.

Q. Thank you.

Mr. Sedgwick: May we offer this as defendant's exhibit, if your Honor please?

Mr. Melchior: No objection.

The Court: May be received.

The Clerk: Defendant's Exhibit A in evidence.

(Testimony of Gene Maura Cohen.)

(Whereupon the yellow sheet of paper with writing on was admitted in evidence as Defendant's Exhibit A.)

Q. (By Mr. Sedgwick): When did you first see these notes, Miss Cohen?

A. These are notes that were made by Mr. Melchior at the time of the conversation with Mr. Carter, the bellman. He made them immediately after speaking with Mr. Carter. [43]

Q. Where did he make them?

A. In the lobby of the Hotel Maurice.

Q. You were present when they were made, were you?

A. I was shown them immediately after Mr. Melchior made them and asked if this is what I remember Mr. Carter having said, and they are what I remembered they said.

Q. This was before you left the hotel?

A. That's correct.

Q. All right. Any of the notes made in your handwriting? A. No, sir.

Mr. Sedgwick: May I read the exhibit to the jury, if your Honor please?

The Court: Yes.

Mr. Sedgwick: Reading Defendant's Exhibit A.

"Dick Carter, bellman, was loading bags in cab, hers. Came back to open door and 'there she was' on her knees. Door more or less closed. Carter said in the presence of Gene, Lohman and K.W.M. he pulls carpet back regularly when it bunches up, watches it and sees that when it bunches up it will

(Testimony of Gene Maura Cohen.)

not stay in dangerous condition (condit.) — pretty regularly—it will flip up only when someone's heel catches on it. Pix 10:30 to 11:00 a.m. 8-15-1957, Dick Lohman, one wide angle shot of lobby, two, detail low angle of carpet lip, three, detail of elevation at door." [44]

Q. What time was your plane to leave that morning, do you recall?

A. Excuse me, could you repeat the question?

Q. Yes. Do you know what time your plane was scheduled to leave that morning?

A. Yes, it was scheduled to leave at 8:45.

Q. Did you come downstairs with your mother?

A. No, I came down after my mother did.

Q. How much time elapsed from the time your mother left the room and you came down?

A. Only a few minutes.

Q. During that time had she paid the bill?

A. Yes, she did.

Q. Had the bellman come up to get your bags to your room?

A. I don't recall whether he came up before she went down or afterwards, but the bags were already gone.

Q. Did you carry them down, you and your mother, or did the bellman come up to your room?

A. The bellman came and took them down for us.

Q. I beg your pardon?

A. I believe the bellman came and took them down for us.

Q. Had he taken them before you left?

(Testimony of Gene Maura Cohen.)

A. Yes, he had.

Q. Was your mother waiting for you?

A. That's right, she had just finished paying the bill. [45]

Q. Where did you start out from, the desk or the elevators?

A. I came from the elevator.

Q. Where was your mother when you came out of the elevator?

A. She was waiting in front of the elevator for me.

Q. You started out together?

A. She was a little bit ahead of me.

Q. Were you in a hurry? A. No.

Q. Were you always at least three steps behind your mother up until the time this accident occurred?

A. I don't recall the exact amount of steps, I was always a little bit behind.

Q. I think you said you were about three steps behind her; is that substantially correct?

A. Yes.

Q. That is your best recollection?

A. That's right.

Q. Can you tell us whether she was walking fast or slow?

A. She was walking at a normal pace, sir.

(Testimony of Gene Maura Cohen.)

Q. Do you recall whether it was her toe or her foot that got caught in the rug?

A. It was her toe, to the best of my recollection, sir.

Q. Did you see that? [46]

A. I saw it as a whole picture. I wasn't watching her foot specifically, but I believe it was her toe that caught.

Q. When you say you believe it was is that something you remember seeing or something you have been told?

A. Something that I remember seeing as a part of a whole picture of someone falling, sir.

Mr. Sedgwick: I think that is all, your Honor.

Redirect Examination

Q. (By Mr. Melchior): Miss Cohen, how soon after the conversation with Mr. Lohman were the notes made that are now Defendant's Exhibit A?

A. The notes were made immediately after speaking with Mr. Carter, the bellman, sir.

Q. How soon after they were made were they shown to you?

A. Immediately after they were made.

Mr. Melchior: That's all.

The Court: Step down.

(Witness excused.)

Mr. Melchior: Mr. Yosiph. [47]

SHAUL P. YOSIPH

called as a witness by the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name, your address and your occupation to the Court and jury.

The Witness: My name is Shaul P. Yosiph.

The Clerk: Where do you live, your office address?

The Witness: 235 West Portal.

The Clerk: San Francisco?

The Witness: San Francisco.

The Clerk: Your occupation?

The Witness: Rugs and carpets.

The Clerk: Dealer in rugs and carpets?

The Witness: That's right.

Direct Examination

Q. (By Mr. Melchior): What did you say your occupation was? A. Rugs and carpets.

Q. What has been your experience with rugs and carpets, when did it start and where did you acquire it, and what work have you done in the field of rugs and carpets?

A. Well, sir, I have been in the rug business since 1927, and at this particular place I have been 19 years, and I worked eight years with Marshall Field in Chicago.

Q. What position did you hold there? [48]

A. I was a salesman of rugs and carpets.

Q. Prior to that time where did you work?

A. I had a business in North Carolina, Charlotte, North Carolina, for four years there.

(Testimony of Shaul P. Yosiph.)

Q. What was the occasion for your leaving Marshall Field in Chicago?

A. I came—it was on a season like this, to visit, to California because I had some relatives in the city and, when I did, I met my wife-to-be, so we got engaged. We got married and we went back to Chicago. We lived there two years and she always told me how beautiful it is in San Francisco and what a good chance for me will be to start a rug business here. So I took her word for it and I came in 1939. We both came back here and I started a business.

Q. What range of experience in connection with rugs and carpets have you covered since 1927? Would you tell the jurors what you know about rugs and carpets and what you have done in that field?

A. Well, sir, my shop is a rug and carpet business. I sell Persian rugs, Chinese, Indian and all types of American-made rugs such as wall-to-wall carpeting or making them in rug sizes, and naturally, with the rug business, you have to sell pads to go under the rugs. So I carry most of the pads to be used in this business and I have some samples to show; if there is need for it, I will be very happy to. [49]

Q. Will you tell the jurors what you know, if anything, about rug installations and spreads?

A. Well, there is two ways of going about this.

Q. I am sorry, Mr. Yosiph; just tell the jury

(Testimony of Shaul P. Yosiph.)

at this time what your experience has been in that field.

A. In this—whenever we use the word “installation,” it always suggests wall-to-wall, where there are tacks into the carpet and goes to all of the area of the room, and the other method of installation is the tackless strip, and these certain strips go around the wall and the carpet goes over these tackless strips and it creates a tension to give a smoothness and very neat looking appeals to the floor covering.

Q. I would like you to tell the jurors—Pardon me for interrupting you—tell the jurors first what experience you have had with respect to how carpets and rugs are placed or spread or installed.

A. Well, that's what I—

Q. Tell how long—

A. I think that is what I was about to; that is what I was explaining, because the word “installation”, it indicates the area to be covered with wall-to-wall where that tackless strip is or driving tacks into the carpet. When you walk, you see the bottom of the tacks.

The other one is rug sizes, like 9 x 12, 3 x 5 or 10 x 15, or 12 x 18. That is not installed; that is just—you spread the pad and then you spread the rug on top of it and that's the way it is done.

In other words, there's two ways of spreading the rug on the carpet—I mean, the carpet on top of the pad. One is in terms of rug size; it could be irregular, it could be regular, could be narrow

(Testimony of Shaul P. Yosiph.)

or wide, could be any kind of size imaginable. But the word "installation" applies to the rug wall-to-wall; either tacks are driven into the carpet, as many of you have in your houses, or it is put down on the top of the tackless strip around about the wall.

Q. Now, would you tell me for how many years you are personally familiar with how carpets and rugs are spread or placed?

A. Well, sir, since 1927. This will be around how many years? Will be 24, 25, 29 years; maybe 30 years.

Q. Have you given public lectures on the subject of rugs and carpets?

A. Yes, I give talks on Persian rugs or carpeting, on carpeting, variety of them, try to give the information to the public, some points to take them with them through my talks as to how to recognize poor carpet from a good one or, if it happen to be Oriental rugs, how to recognize a poor one from a good one.

Q. About how many such speeches have you given to date, Mr. Yosiph?

A. Well, I didn't keep account because it would be more than a hundred times. [51]

Q. That would be fine.

A. I have done it at Lions Clubs, in the Women's Clubs, especially in this city more than any other city because of the length of time I have been here, and I have done it in schools and universities and churches.

(Testimony of Shaul P. Yosiph.)

Q. Have you testified as an expert on rugs in courts before this?

A. I have on two occasions; one occasion was in North Carolina and—

Q. I don't think you have to say what the cases were; just state whether you have.

A. One was in Charlotte—

The Court: You needn't talk about that.

Q. (By Mr. Melchior): All right. Now, did you make an inspection of the lobby of the Hotel Maurice at my request? A. I did.

Q. When did you make that inspection?

A. Somewhere around 1:00 o'clock, between 1:00 and 2:00.

Q. This Sunday?

A. This Sunday, this last—yesterday.

Q. Now, I will show you Plaintiff's Exhibits 1, 2, 3 and 4 in evidence and ask you to look at those exhibits and tell the jury whether the condition of the rug in the lobby of the Hotel Maurice, when you examined it, was the same as it is in these pictures. [52]

Mr. Sedgwick: Object to that, your Honor, as incompetent, irrelevant and immaterial.

Mr. Melchior: I don't think it is immaterial at all; I think it bears heavily on the question of whether his inspection—

The Court: Not what the situation is now, how it compares with what the pictures show. That is wholly immaterial. Objection sustained.

(Testimony of Shaul P. Yosiph.)

Mr. Melchior: May I be heard further, your Honor?

The Court: Yes, out of the presence of the jury. Ladies and gentlemen of the jury, the officer will escort you to the jury room for a minute or two while counsel discusses this with us. While you are out of the courtroom, don't talk about this case with anybody.

(Whereupon the jury retired from the court-room.)

Mr. Melchior: It seems to me, if your Honor please, that there are two ways in which an expert can bring his expert knowledge to bear on the particular situation. One is by being asked hypothetical questions about evidence testified to by other witnesses, and the other would be by tests and comparisons which the expert makes in order to show that and if the latter is the means used to bring out the testimony and the observations of the expert, then the only way in which such experiments or evidence would be material and [53] admissible would be by showing that the conditions were the same as they were at the time of the accident.

The Court: Tell me, what is the situation?

Mr. Melchior: The situation is this: That the expert looked at these pictures recently—

The Court: I know. What is the situation in that lobby now?

Mr. Melchior: It is just the same as it was at the time of this accident; there is no change.

(Testimony of Shaul P. Yosiph.)

Mr. Sedgwick: It isn't as shown in those pictures, your Honor; that's my point.

Mr. Melchior: The expert, if asked, will testify that he compared those pictures with the lobby at the time he was there and he concludes that the conditions are the same.

The Court: Now, of what interest is that to us whether they are or not?

Mr. Melchior: Well, he did not make his inspection at the time of the accident, he made his inspection recently and he is going to say, he is going to testify as to the unsafeness of the conditions that he found there and—

The Court: Well, I don't think we are going to let him do that. That's a conclusion of your expert, that isn't the subject of expert testimony.

Mr. Melchior: Well, I think experts always testify as to their conclusions on the basis of their expert knowledge. [54]

The Court: Yes, but you left out all of what I said, "it is the subject of expert testimony."

Mr. Melchior: It is under California law, your Honor, if I may show you some authorities.

The Court: What, that a fellow can look at the situation and say whether it is safe or unsafe?

Mr. Melchior: Well, no—well, one of the questions in this case is whether the lobby is reasonably safe, was reasonably safe for the purposes for which it was used, and that is the law of California, that it has to be reasonably safe. There are recent cases which—

(Testimony of Shaul P. Yosiph.)

The Court: Sure, it has to be reasonably safe, but what we do is receive evidence here which paints the picture of the conditions there existing at the important time and then the jury and I decide that question about whether it is reasonably safe.

Mr. Melchior: I respectfully beg to differ with your Honor. Section 1870 of the California Code of Civil Procedure reads in part as follows:

"evidence may be given upon a trial of the following facts:

Subsection 9: The opinion of a witness—"there is an elision, Mr. Reporter—"on a question of science, art, or trade, when he is skilled therein;"

And the authorities under the subject, for instance,— [55]

The Court: That's a far cry from what we have here.

Mr. Melchior: For instance, Wallace against Speier, 60 California Appellate 2d 387, page 392, a plumber testified as an expert and was sustained on appeal as to the installation of plumbing in a building.

The Court: If you were in the State Court you might persuade me, but you are not. This is a procedural matter here and we follow our own procedure.

Mr. Melchior: I don't think it is a procedural matter, your Honor.

The Court: Sure it is, admissibility of evidence.

Mr. Melchior: Well, as I understand the rule on evidence, I believe it is Rule 43, it says State

(Testimony of Shaul P. Yosiph.)

rules shall be followed. Where there is a question the rule favoring the admission of the evidence shall be followed. I am quite sure of that. I don't have it with me here. I think your Honor sits here in this matter as a State Judge of the State of California.

Mr. Sedgwick: No, I can't agree with that.

The Court: No, I don't think so.

Mr. Sedgwick: Furthermore, your Honor, this is an attempt to ask this man to decide a case which is what we have a court and jury for.

The Court: That's right. In the first place, I don't believe it's the subject of expert testimony.

Mr. Sedgwick: That's correct, your Honor; I am sure that it is not.

The Court: Here you have a rug lying on the floor in a hotel lobby and you want to have an expert tell us whether the way that rug is laying there is a safe situation. I don't think that is the subject of expert testimony.

Mr. Melchior: Well, all I can say to your Honor is that on the basis of the authorities I have mentioned I have stated what I believe the law to be.

The Court: You haven't presented me an authority yet on this subject. You're talking about a State rule on evidence. Now, where is your authority that this type of thing is the subject of an expert's testimony?

Mr. Melchior: I think with respect to the State rules I think it would be admissible. If your Honor would agree with me on that as to the showing I

(Testimony of Shaul P. Yosiph.)

have made on that point, maybe I can go on to show the relation between the State rule and the function of this court.

The Court: Why do I have to agree with you before you show me?

Mr. Melchior: Well, assuming that to be so, you don't have to agree with me, but passing that point for the purpose of understanding where we are—

The Court: Now, there are subjects on which an expert can give us some help, and we have them do it; medical experts, [57] for example, physicians, chemists. There are many fields in which an expert can give us some real help and indeed do and we can't proceed without them. But on the other hand, there is a whole lot of them that an expert can't help us with at all. It is a matter of common sense, good judgment, and the exercise of one's faculties of observation.

Now, it seems to me that we are now talking about a subject that falls into the latter category rather than the former. In other words, my shorthand way of referring to it is that this subject is not the subject of expert testimony. An expert can't help us on it, we don't need him and anybody can take a look at that thing and tell us just as much as this man can. As a matter of fact you have photographs. The jury can look at those photographs, I can look at them. Why tell this man to go up and take a look at that rug on that floor and then come in and say to the jury that is an ex-

(Testimony of Shaul P. Yosiph.)

tremely dangerous situation when the jury is just as able to observe that situation as he is.

Mr. Melchior: Well, if the Court please, this man would, if he were permitted to testify, make demonstrations here in court as to the type of mat which must be placed under a carpet or rug which is not fixed to the floor. This would be a matter of expert testimony, and we will testify as an expert that the mat that is placed under this rug, that was under the rug at the time of the accident, is a mat which [58] causes a tendency to slip and which causes the rug to slip.

The Court: There is no evidence here that the rug slipped. Your whole case is that it was lifted up.

Mr. Melchior: And that the slipping causes loops and wrinkles as people walk on it, leaving the rug after the slippage in a looped and wrinkled condition, and that will be his testimony and I believe that is a matter for experts to testify as to the effects on the type of weave of a rug with respect to the kind of mat that lies on the floor and the kind of binding qualities which one mat or another may have, if a rug is installed as a fixed installation or whether it is merely spread on the floor, whether it is tacked down or not. There are people that specialize in this sort of thing and it is not a matter for lay knowledge at all.

The Court: That isn't what you are talking about. The point of evidence that I ruled on, to which you asked permission to address yourself, was whether he should be permitted to say whether

(Testimony of Shaul P. Yosiph.)

these photographs show the same condition as existed up there yesterday or the day before, whenever he went up and looked at it. Now, on that point, that is the only point at this juncture. On that point, I think that's immaterial.

Mr. Melchior: Well, he is going to testify as to what the—if he were permitted to testify, he would testify as to the safety of the condition as he found it, which I have got to connect up. [59]

The Court: You can have a ruling on that, and that is, that is not a subject of expert testimony and I shall not permit him to testify whether it is safe or isn't safe. Now, beyond that, we will decide that when we get to it.

If you are talking about textures of carpets and pads, why, that may be something else again, I don't know about that; but on the two points I think it is pretty clear you are not entitled to have the witness say anything at all about what the condition is today; it's immaterial what the condition is today. You mean you want to show that these fellows are still maintaining a terribly dangerous situation?

Mr. Melchior: That's not my interest at all, your Honor. My only interest is to tie up this man's observations and experiments with the time of the accident.

The Court: Well, he is looking at photographs. Now, that is all he sees.

Mr. Melchior: He obviously wasn't there at the time of the accident.

(Testimony of Shaul P. Yosiph.)

The Court: Of course not, but you have photographs of the condition. You can ask him about those photographs. You can't ask him if it is dangerous, I won't permit you to do that; but you can ask him about anything that is a proper subject of an expert examination. But that is ordinary horse-sense judgment that anybody can make and we don't need the [60] expert help on it. I am not going to have you ask him that question.

You can make a speech to the jury at the proper place, Mr. Melchior, only don't need this witness to do it.

Mr. Melchior: Well, in my opinion, your Honor, he can testify to it for the reasons that I have indicated. I don't wish to belabor the point but I do want to preserve it for review, if necessary.

The Court: You have got it.

Mr. Melchior: I think I have it now, don't I?

The Court: Yes.

Mr. Melchior: May I make a formal offer of proof at this point, just to have the record clear?

The Court: Haven't you already done it?

Mr. Melchior: All right, fine. And may I be clear on your Honor's ruling so we don't have to take the jury out again? Your Honor's ruling is he may testify as to conditions of the adhesive quality—

The Court: He can testify to what he saw, as he saw it at the time and place in question. He can look at these photographs and I don't see how he is going to help you with those and tell us what

(Testimony of Shaul P. Yosiph.)

he sees there, if that is of any assistance to you, but if you are going to ask him to say that was a terribly dangerous situation or a dangerous situation, I am not going to let you do that and I am not going to let you [61] ask him whether what he sees in this photograph is what he saw yesterday when he went up and looked at the hotel lobby. Telling us what the conditions are up there today or were yesterday or were at any time, except the morning of the accident, is immaterial.

Mr. Melchior: May I ask him if what he sees in these photographs is, in his expert opinion, a safe or unsafe condition?

The Court: Certainly not; that is exactly what we have been talking about.

Mr. Melchior: Well, the problem of time is one problem, and the problem of range is another.

The Court: I am not talking about time; I am talking about this being a question which is not a proper expert witness question.

Mr. Melchior: I obviously—

The Court: You know, I have an idea you're a better expert on that subject than he is.

Mr. Melchior: I am not a—

The Court: You fellows who try these personal injury suits are—

Mr. Melchior: This is my first one, your Honor.

The Court: Is it?

Mr. Melchior: Yes, I am a tax lawyer. It really is. Mrs. Cohen is a social acquaintance of mine. This is my first such case. [62]

(Testimony of Shaul P. Yosiph.)

The Court: Well, you are doing all right.

Mr. Melchior: Thank you.

The Court: I think I must sustain—You do object to that?

Mr. Sedgwick: Oh, yes, your Honor.

The Court: I am assuming he has made an offer of proof and in a proper procedural way, and I suppose you would make the same objection?

Mr. Sedgwick: Yes, your Honor, I will object, your Honor, on the ground that it is incompetent, irrelevant and immaterial, not a proper subject of expert testimony and this man has not been, as yet, at least, qualified as an expert on the subject to which these questions have been placed.

Mr. Melchior: May I have a ruling on that last subject separately, your Honor?

The Court: Objection sustained.

Mr. Melchior: On the qualification of the witness?

The Court: On the subject you are talking about. I mean, I just don't think this is the subject of expert testimony so how are you going to qualify him?

Mr. Melchior: In other words,—

The Court: He may be an expert in rug texture, that sort of business, and I am not prohibiting him from testifying about that, but if you want to ask if this is a safe or unsafe situation, I say to you that is not a proper subject for expert testimony.

Mr. Melchior: Well, I am very sorry that your Honor feels that way. I feel that I have done all that I can to persuade you and, if the case is going

(Testimony of Shaul P. Yosiph.)

to hinge on it, it's very unfortunate but I don't see what else I can say.

The Court: Well, the case isn't going to hinge on it; all I am doing is making a ruling on a motion you made.

Mr. Melchior: It may or may not hinge, but it may.

The Court: Well, we will see about that.

Mr. Melchior: All right.

The Court: Bring in the jury.

(Whereupon the following proceedings were had in the presence of the jury.)

Q. (By Mr. Melchior): Mr. Yosiph, I show you Plaintiff's Exhibit 3 and ask you to look at the rug. Is that what is known as a Chinese rug?

A. It is a Chinese pattern rug.

Q. And is that a free-lying rug or is that a rug which is in some manner fastened to the floor?

A. No, this is just loosely thrown on the top of the floor.

Q. Now, from your experience, Mr. Yosiph, do you know what are the qualities of adhesion to the floor surface of rugs which are called Chinese rugs? How should they be properly and safely placed on the floor?

The Court: You have asked two or three questions there. [64]

Mr. Melchior: All right.

Q. From your experience, what are the properties of adhesion to a floor surface of loosely placed Chinese rugs?

(Testimony of Shaul P. Yosiph.)

Mr. Sedgwick: I will object to that, your Honor, on the ground that the foundation has not been laid for this question. There may be many types of Chinese rugs. We don't know whether this man has performed any experiments or whether he is in the business of experimenting with cohesion, the coefficients of friction and things of that kind.

The Court: Well, all he said was that this was a Chinese pattern.

Mr. Melchior: No, I asked him whether it was a Chinese rug.

The Court: Well, if you will read his testimony back, Mr. Reporter.

Mr. Melchior: All right, I can straighten that out.

The Court: Well, let's see what he said. Will the reporter read it, please?

(The answer was read as follows: "It is a Chinese pattern rug.")

The Court: That is a far cry from what you are talking about.

Q. (By Mr. Melchior): Mr. Yosiph, in the rug business, [65] is there such a thing as a special kind of rug known as a Chinese pattern rug?

A. Yes, there is rugs that is known by the name of Chinese pattern rugs.

Q. Will you describe the kind of a rug that this is?

A. This is 9½ wide by 30 feet long.

Q. I don't mean this particular rug; what is a Chinese pattern rug?

(Testimony of Shaul P. Yosiph.)

A. Well, each rug has its own pattern, so if there will be a hundred different rugs, there will be one hundred different patterns, as far as speaking on the basis of pattern. There is no limitation to them; it's wide open. So it is with Persian rugs; so it is with Chinese.

Q. In other words,—

A. Being specific, this rug was $9\frac{1}{2}$ wide, 30 feet long and it was loosely thrown on the top of the pad, crossways but—By the way, when I saw the rug, there was a pad, a rubber pad across it. In other words, I didn't see the situation as it was in the pictures because, when I went there and I saw a pad across the rug—as you walk, in other words, your feet will touch the rubber pad, not the rug, so that was something new to me there.

Q. Now, my question right now is: What is a Chinese rug as distinguished from any other kind of rug?

A. Chinese rugs are hand-made and they are patterned [66] different than any other type of rug in relation to the Persian or to the rugs made in this country, they are machine-made, so there is a distinction between the Chinese rug and any other country or machine-made rug.

Q. Was the rug itself, you saw in the picture, a Chinese rug? A. I would think it is.

Q. What experience have you had with respect to the way in which Chinese rugs should be placed on floors? State your own experience, please.

A. It is necessary the rugs should have a—

(Testimony of Shaul P. Yosiph.)

Mr. Sedgwick: Excuse me, Mr. Yosiph. Pardon me, your Honor, his question was?

The Court: "What is your experience"?

You don't seem to understand the word "experience."

Mr. Melchior: I can't hear your Honor. The echo.

The Court: I was saying to the witness that he doesn't seem to understand the word "experience."

Mr. Melchior: Thank you.

The Court: Now, you are going to have to get at it in some other way than by asking him about his experience because, as soon as you do, he starts to describe the rugs and one thing or another.

Q. (By Mr. Melchior): Mr. Yosiph, what do you know, on the basis of all of your years in the business—

The Court: That's going to get him right back—

Q. (By Mr. Melchior): Not this rug, but [67] Chinese rugs in general, how they lie and are placed on floors.

A. Well, I would use the word "experience" because I have confidence in myself to understand the word "experience." My experience teaches me the rug should have a pad.

The Court: Well, you see, that isn't what he asked you at all. You understand "experience" in one sense and counsel is asking about your experience in another sense. What he means by "experience" is, how many years have you dealt with rugs. How many years?

(Testimony of Shaul P. Yosiph.)

The Witness: Thirty years.

The Court: What did you do, did you make rugs, did you sell rugs?

The Witness: I sold rugs. I repair rugs, I clean rugs, I lay rugs.

The Court: For 30 years?

The Witness: Thirty years. That is the only way I make my living.

The Court: All right. Now we are getting there. Now, go on from there. I don't want to examine him.

Q. (By Mr. Melchior): Now, what do you know, on the basis of these 30 years, Mr. Yosiph, about how Chinese rugs lay on the floor?

Mr. Sedgwick: I am going to object to that, your Honor; incompetent, irrelevant and immaterial, not the subject of expert testimony. [68]

The Court: Well, I think so, Mr. Melchior. In the first place, I don't know anything about this Chinese business yet, because all he says is that rug has a Chinese pattern. Now, the pattern hasn't got a blamed thing to do with how the rug lays on the floor, how it adheres to the floor or doesn't adhere to the floor. It doesn't make a bit of difference. That is all he says: This is a Chinese pattern rug.

Q. (By Mr. Melchior): Mr. Yosiph, I show you a picture of a rug again. This time I will show you Plaintiff's Exhibit 4. Is that a Chinese rug?

A. It is.

Q. Are Chinese rugs different from other rugs?

The Court: Let's find out what he means by a

(Testimony of Shaul P. Yosiph.)

"Chinese rug." What do you mean by a Chinese rug?

The Witness: A Chinese rug is made in China. It is made by hand. Just like you say, "What is an American rug?" I will say it is made by machine, the wool is spun by machine, it is woven into a rug by machine. And the Chinese rug also is different than a Persian rug or a Turkish rug because of the peculiar pattern and colors. Therefore, when I see a Chinese rug, immediately I distinguish it from the rest of all the rugs that I know, regardless where they are made.

The Court: What distinguishes it? [69]

The Witness: It is the peculiarity; it is the outline, its construction, its adaptation of color and pattern.

Q. (By Mr. Melchior): Is there anything in the weave of a Chinese rug which distinguishes it from other rugs? A. It does.

Q. What is that?

A. It is—being hand-made, it is very hard for me to give words to describe. It is just like here we are about 20 people and we have a pen—I have to answer your question in the terms of an illustration that I am about to say, and we have given a pen and to write one sentence and all of us have the same ink, the same pen, all our handwriting will be different, yet we wrote the same sentence. Chinese rug is the same way; Persian rug is the same way. If we have all the yarn, all the pattern, each weaver differs than the other because you have

(Testimony of Shaul P. Yosiph.)

the characteristic of something that is made by hand, so I cannot be too accurate about how to differentiate a Chinese rug from a Persian or a Persian rug from an Indian rug or an Indian rug from any other hand-made rugs, because they all have peculiarities and each has a pattern of its own.

Q. In other words, is the hand-made rug, as against the machine-made rug, which makes the difference in the way in which the rug lies; is that right? A. That is right.

Q. This was a hand-made rug, was it, in the pictures? [70] A. That is right.

The Court: I am afraid you testified, counsel, not the witness.

Mr. Sedgwick: Your Honor, could we ask that the last question and answer be read?

The Court: You couldn't hear?

Mr. Sedgwick: I couldn't get it; they were both arguing, talking at the same time.

The Court: All right, would you read the last question and answer?

(Record read.)

Mr. Sedgwick: That is the part that I missed, "the way it lays on the floor." I asked that it be stricken for the purpose of the objection on the ground that it is leading and suggestive, and the answer be stricken for the purpose of the Court's ruling.

The Court: The answer is stricken. The objection is sustained. It is leading and suggestive.

Q. (By Mr. Melchior): Mr. Yosiph, will you

(Testimony of Shaul P. Yosiph.)

state whether there are special qualities about floor adhesion, about lying on the floor, of certain kinds of floor coverings as distinguished from other kinds?

A. Yes.

Mr. Sedgwick: Just a moment, please, Mr. Yosiph. I am going to object to that, your Honor, as the subject of [71] expert testimony, first, upon which this witness is not shown to be qualified as an expert; secondly, it is not the proper subject of expert testimony. Certainly the qualities of adhesion—he has not been shown to be an expert on that, or that any tests were made as to this particular rug, or anything of that kind.

Mr. Melchior: It is not a matter of tests, your Honor. This is a general question which is part of the setting in which the expert testimony is required.

The Court: Really preliminary, then?

Mr. Melchior: Really preliminary.

The Court: Overruled. You may proceed.

Q. (By Mr. Melchior): You recall the question, sir?

The Court: Read it to him.

(Record read by the reporter.)

Q. (By Mr. Melchior): What are the special qualities and what types of rugs possess—floor coverings, excuse me—which type of floor coverings possess which qualities of adhesion?

Mr. Sedgwick: Just a minute, please. There are two questions there; first, are there differences, and then, what are the differences?

(Testimony of Shaul P. Yosiph.)

Mr. Melchior: I think I should choose the first question. The question now is—

The Court: This witness is going to have a lot of [72] trouble unless you just ask him one thing at a time.

Mr. Melchior: All right.

The Court: Make it as simple as you can.

The Witness: I would appreciate it.

Q. (By Mr. Melchior): What, Mr. Yosiph, if anything, are the special qualities of lying on the floor of different classes of floor coverings?

A. I would like to ask this permission—

Mr. Sedgwick: Excuse me. I hate to be popping up and putting up my hand, but I must stop you. We now object, your Honor, this is not the proper basis of expert testimony, one; two, that it is incompetent, irrelevant and immaterial; and three, that this man has not been qualified as an expert on the coefficient of friction or anything of that kind, or that any foundation has been laid of any tests of this rug. The question of what some other rug might do, I think, is completely immaterial on some other surface.

Mr. Melchior: Your Honor please, the question is as to the various types of rugs and the witness has stated to which class or type of rug this particular rug belongs. He is qualified to testify on that subject on the basis of 30 years' experience in installing various kinds of floor coverings.

The Court: We are not talking about whether he knows rugs, floor coverings; we are talking about

(Testimony of Shaul P. Yosiph.)

the adhesive quality, or the lack of it, of this particular rug. [73] Now, did he make any tests?

Mr. Melchior: He has not made any tests, your Honor.

The Court: How does he know that? How can he help us?

Mr. Melchior: He will testify—Should this be out of the hearing of the jury?

The Court: Well, I have heard most of it. I don't think it is going to help us to talk to me about this, with the jury out in the jury room, any further. If you can ask this witness a question that is a proper question, we will let him answer. Now, I don't want to limit you. If there is anything at all that he can help us with, we want to hear it. Now, let's see if there is anything he can help us with. I must say I am somewhat doubtful about it, but I am not going to limit you.

Q. (By Mr. Melchior): Mr. Yosiph, have you made tests as to how Chinese rugs should lie freely on the floors?

Mr. Sedgwick: Your Honor, that's purely a conclusion of this witness.

The Court: No, he is asking if he has made tests.

Mr. Sedgwick: Excuse me.

The Court: That is a proper question. The objection is overruled.

Did you ever make any tests about rugs lying on the floor? [74]

The Witness: Your Honor, may I say just one

(Testimony of Shaul P. Yosiph.)

word in reference to the word "test" and to the one word "adhesive"? These are two scientific words. I don't want to be involved in them. Why shouldn't we talk plain English, put the pad and put the rug on top of the pad? That is the question to be discussed. Adhesive tests—I am not a laboratory.

Q. (By Mr. Melchior): Just a minute.

The Court: Well, you see, counsel, your witness now tells us he isn't qualified to do that.

Mr. Sedgwick: That's right.

The Court: He said all he knows, you put a pad on the floor.

Q. (By Mr. Melchior): Mr. Yosiph, do you know what happens if various kinds of pads are placed under loose Chinese rugs? Do you know what happens then? A. Yes, it depends—

Mr. Sedgwick: Just a minute. You have answered the question.

Q. (By Mr. Melchior): What kind of pads are there which can be placed under such rugs?

Mr. Sedgwick: Just a minute. Your Honor, that is completely immaterial in this case, what kind of pads have to be placed. We are dealing with one rug and one pad and we are dealing with something that people are generally familiar with and it is not the subject of this type of expert testimony.

The Court: Well, your own witness, [75] Mr. Melchior, says he doesn't want to get into that because he doesn't know anything about it. He is no laboratory, is his phrase.

(Testimony of Shaul P. Yosiph.)

Mr. Melchior: Obviously he isn't a laboratory man, your Honor, but he has the experience. The words "adhesion" and "test" may smack of the laboratory, but they really mean nothing other than "Did you try it, and how does it lie on the floor?"

Mr. Sedgwick: No, no, no, no. I am going to ask that that remark be stricken, your Honor.

The Court: Yes.

Mr. Sedgwick: That is testimony of Mr. Melchoir.

The Court: Counsel's statement.

Q. (By Mr. Melchior): Mr. Yosiph, what is a foam rubber pad?

A. There are several kinds of foam rubber. I could tell by the way the term is applied to them. For instance, foam rubber, sponge rubber, solid rubber, and there are some pads are rubberized rubber; they are not 100% rubber; so there are these different types of rubber pads used on the market, in my shop as well as in any other shop.

Q. Is there such a thing in the rug and carpet business as a foam rubber pad with molded ridges?

A. Yes, there is pads completely 100% rubber pads and there are pads covered with a rubber, the top and the surface, [76] and there are other pads that are made of rubber, but they have a lining on the surface of the rubber to give a little bit solidity to it, little bit protective, because otherwise it will be spreading.

Q. The question right now is, what is a foam rubber pad with molded ridges? What sort of a thing is that?

The Court: That's not involved in this case, is it?

Mr. Melchior: Yes, it is, your Honor.

The Court: Is it? There's no evidence here that it is. This man can't help us on that subject because he wasn't there at the time of the accident so there is no evidence in this case of that sort of thing. You are getting outside of the evidence.

Mr. Melchior: I think I would like to address the Court out of the hearing of the jury; I think it is time for a recess.

The Court: Oh, you do?

Mr. Melchior: I am sorry; I beg your pardon.

The Court: I am in the habit of deciding that one myself.

Mr. Melchior: I am very sorry, your Honor.

The Court: That's all right.

Ladies and gentlemen, the Court Officer will take you to the jury room. Don't talk about this case while you are out. [77]

(The jury retired from the courtroom.)

Mr. Melchior: I certainly didn't intend any such implication.

The Court: No offense; you don't need to say anything about it.

Mr. Melchior: The problem that I have now, your Honor, is that I appreciate that this is not in evidence because of the ruling that your Honor has made that he can testify to what he observed, but if I may recall the young lady, I think she can testify as to the kind of pad, if I may do that.

The Court: All right. Well, we will take a short recess. That is a good suggestion.

(Recess.)

Mr. Melchior: With your Honor's permission I would like to withdraw the witness briefly and put Miss Cohen back on the stand.

The Court: You may do so.

GENE MAURA COHEN

recalled, having been previously sworn, testified as follows:

The Clerk: Will you please restate your name for the record?

The Witness: Gene Maury Cohen.

Further Direct Examination

Q. (By Mr. Melchior): Miss Cohen, you testified earlier that immediately [78] after the accident you took a look at the edge of the carpet; do you recall that? A. Yes, that's correct.

Q. Did you observe anything at that time about the manner in which the carpet was placed with respect to any covering that might have been under it?

A. Yes, the carpet was longer than the pad which was underneath it and supposed to hold it on the ground. It was—I don't know exactly how much longer, but I'd say about four or five inches and it was extending beyond the pad.

Q. Was that condition the same the next day when the pictures were taken?

(Testimony of Gene Maura Cohen.)

A. Yes, it was.

Q. I will show you Plaintiff's Exhibits 1, 2, 3 and 4. Can you show on those pictures where, according to your observation, the mat under the rug extended? If you can, I would like you to mark that.

A. (Witness marking.) I am not sure of the exact place because of the perspective of the pictures.

Q. All right, if you are not sure, then don't mark them.

Mr. Sedgwick: We will object to the marking if she is not sure.

Q. (By Mr. Melchior): If you are not sure, don't mark it.

The Court: Let me see those pictures. [79]

Mr. Melchior: I am sorry, your Honor.

Q. What was the appearance of the part where the mat did not extend to the length of the floor—to the length of the carpet, I beg your pardon?

A. Could you repeat that question, please?

Q. What did it look like at the place where you testified the mat was short of the edge of the carpet?

A. Well, the carpet was raised at this point.

Mr. Melchior: That's all.

Mr. Sedgwick: I have no questions.

The Court: Step down.

(Witness excused.)

Mr. Melchior: All right, Mr. Yosiph.

SHAUL P. YOSIPH

Further Direct Examination

Q. (By Mr. Melchior): Mr. Yosiph, what is the effect of having a mat under a loose-lying rug which is four to five inches short of the edge of the rug?

Mr. Sedgwick: Just a moment. It would seem to me this is entirely not the subject of expert testimony, that is a matter of common knowledge. We don't know any of the particulars. Object on the ground—

The Court: You are not talking about this case so it is immaterial.

Mr. Melchior: May I have the pictures? [80]

The Court: Here they are.

Q. (By Mr. Melchior): Mr. Yosiph, I show you Plaintiff's Exhibit 1. Assuming that Plaintiff's Exhibit 1 shows a carpet laid in a public place with a mat under the carpet and the mat extending four to five inches short of the edge of the carpet on the side facing you in the picture, and based upon your 30 years' experience in laying carpets, what would be the effect of such a position of the carpet and mat as to the safety of the rug for purposes of having people walk on it?

Mr. Sedgwick: Just a minute. Object to that, your Honor, as incompetent, irrelevant and immaterial, not the proper subject of expert testimony on which this witness has not been qualified as an expert; on both grounds.

The Court: Sustained. That is the same question

(Testimony of Shaul P. Yosiph.)

we talked about while the jury was out, Mr. Melchior. Exactly the same question we ruled on once.

Mr. Melchior: Excuse me a moment, your Honor.

The Court: Surely.

Q. (By Mr. Melchior): Mr. Yosiph, assuming that in a public hotel lobby a rug is laid as shown in Plaintiff's Exhibit 1, which you hold in your hand, and assuming that a mat lies under that rug which extends four to five inches short of the edge of the rug——

The Court: You say forty-five?

Mr. Melchior: Four to five inches short of the edge of the rug. [81]

Q. (By Mr. Melchior) (Continuing): And assuming that a person weighing 150 pounds had walked across that rug carrying baggage in the direction from the pillars which you see in the picture to the door, what would be the effect of those facts upon the way in which the edge of the rug adheres to the floor?

Mr. Sedgwick: Just a moment, please. Your Honor please, I sound like a broken record but it is incompetent, irrelevant and immaterial, no proper foundation laid, not the proper subject of expert testimony, calling for the opinion and conclusion of this witness, invading the province of the jury and an improper hypothetical question not based on any proper hypothesis in the evidence in this case.

The Court: Sustained.

Mr. Melchior: Cross-examination.

Mr. Sedgwick: I have no questions.

The Court: Step down.

(Witness excused.) [82]

* * * * *

LUCY K. COHEN

the plaintiff herein, called as a witness in her own behalf, sworn. [85]

* * * * *

Direct Examination—(Continued)

Q. (By Mr. Melchior): Mrs. Cohen, where do you reside? [131]

A. In Washington, D. C.

Q. Do you also have any other names by which you are known?

A. Yes; my married name, Mrs. Felix Cohen, and my maiden name, Lucy Kramer.

Q. When were you born, Mrs. Cohen?

A. May 22, 1907.

Q. And will you tell the jury what your education and—

The Court: Mr. Melchior, I think if you will lift your voice a little the jurors will appreciate it.

Mr. Melchior: Yes, your Honor.

Q. Will you tell the jury what your education and employment are?

A. Well, I have my B.A. from Barnard and my M.A. in mathematics from Columbia and most of my points for a doctor's degree, but I never concluded my doctor's degree.

(Testimony of Lucy K. Cohen.)

Q. I am having some trouble hearing you, Mrs. Cohen? A. I am sorry.

The Court: If you will just sit back and lift your voice so that the last juror in the box can hear you, we will get along better.

Q. (By Mr. Melchior): Will you repeat your answer, please?

A. I have my B.A. from Barnard College and my M.A. from Columbia University and all my credits for a doctor's degree, which I haven't yet taken, from Columbia University. I taught [132] mathematics for a short time before I went to live in Washington with my husband. I now am employed at the Public Health Service in Washington, D. C., in the Government.

Q. Where were you employed on August 14, 1957?

A. The President's Committee on Scientists and Engineers.

Q. Is that an agency of the United States Government? A. Yes.

Q. What was your salary at that time?

A. It was what is called a GS-13. \$8,990 per annum.

Q. \$8,990 per annum? A. Yes.

Q. And where were you on August 14, 1957?

A. I was in San Francisco.

Q. What status were you on at that time with respect to your employment?

A. I was on my vacation. I had a few days' leave—annual leave.

(Testimony of Lucy K. Cohen.)

Q. How long had you been away from your office?

A. From about the 7th of August. Just a week.

Q. Would you describe where you had been and what you were doing and what you were doing in San Francisco?

The Court: Well, I don't believe that has any importance in this lawsuit, does it, Mr. Melchior? Let's get to the morning at the Maurice Hotel.

Mr. Melchior: It has importance insofar, your Honor, as— [133]

The Court: That she is an active woman?

Mr. Melchior: That she is an active woman, yes.

The Court: Well, she can tell us about that.

The Witness: I will try to be as brief as I can.

My daughter had been studying and working in Albuquerque, New Mexico, and she asked if I couldn't possibly spend my week's vacation with her going over some of the old ground that she and my husband and the younger child had done some seven years before while he was alive.

We went from Albuquerque to Gallup, to the Gallup Indian ceremonials, which I had never seen.

Q. (By Mr. Melchior): The what?

A. The Gallup Indian ceremonials, which I had never seen. Then we went by bus from there to Los Angeles, and from there to Yosemite National Falls, which I had never seen.

The Court: Well, see, this is going over the same territory. You don't need to corroborate Mrs.

(Testimony of Lucy K. Cohen.)

Cohen's daughter's testimony. She testified to all this.

The Witness: I am sorry.

Mr. Melchior: Very well.

Q. When did you first arrive at the Maurice Hotel in San Francisco?

A. I think about five-thirty on Tuesday, August 13th.

Q. Was that the first time you had ever seen the Maurice Hotel? [134] A. Yes.

Q. How did you happen to be there?

A. It had been recommended to us very highly by an acquaintance, someone who had used it for many years, and I wrote to the Maurice and reserved a room for that one night.

Q. I would like to show you a paper and ask you what this paper is.

Mr. Sedgwick: Excuse me. May I see the paper?

Mr. Melchior: I beg your pardon, sir.

The Court: Is this something to do with the date she was there?

Mr. Melchior: It is a confirmation of her reservation.

The Court: Well, you don't need that. Is there any doubt in this lawsuit that she was there?

Mr. Sedgwick: No, your Honor. We don't question that.

The Court: All right.

Mr. Melchior: All right, we will just go ahead.

Q. How did you spend the night from August 13th to August 14th?

(Testimony of Lucy K. Cohen.)

A. Well, shortly after we arrived we made ourselves comfortable, and then a friend came to call for us and took us sightseeing, took us up to Coit Tower, I think it is.

Q. What time did you retire? [135]

A. We retired, oh, I would say about ten-thirty, after dinner.

Q. And what time did you arise in the morning?

A. Well, I can't say exactly, because I never use an alarm clock, but it must have been fairly early. I usually arise early.

Q. And what was your purpose that morning? What were you intending to accomplish?

A. We were to take a plane, a TWA plane, on our return to Washington on our way East to pick up my younger daughter.

Q. Do you recall the time that the plane was to leave and where your destination was?

A. We had reservations on the plane that left at 8:45, a TWA plane, to arrive in Chicago sometime that afternoon. I don't know exactly what time unless I have the timetable.

Mr. Sedgwick: Would your Honor pardon me a moment? Counsel has handed me several papers. I would like to see what they are.

The Court: I don't think you need to put in the airline schedule. It appears that that is what it is.

Mr. Melchior: One is an airline schedule, your Honor, and the other, your Honor, are notes in Mrs. Cohen's handwriting made prior to this time,

(Testimony of Lucy K. Cohen.)

indicating the time of the plane. There was some point about whether she was taking a plane—

The Court: Well, let counsel look at that [136] and see if you can't say what time the plane left.

Q. (By Mr. Melchior): Mrs. Cohen, I am going to hand you a paper and ask you to identify that paper if you can.

A. Yes, sir. That is a note I made in Washington at the time we were arranging the trip, giving the dates and times of reservations and what planes I was planning to take, and so on. Also, the name of the hotel which had been recommended by a friend, and the friend's name in Tulsa, Oklahoma.

Q. Are these notes you made prior to arriving in San Francisco? A. Oh, yes.

Mr. Melchior: I would like to offer the document identified by the witness as Plaintiff's Exhibit 8.

Mr. Sedgwick: No objection.

The Court: Received.

(Note made by plaintiff marked Plaintiff's Exhibit 8 in evidence.)

Q. (By Mr. Melchior): I will show you another paper, Mrs. Cohen, and ask you to identify it.

A. These are more of my notes on the same subject, TWA telephone call and the plane number and the reservation, also made in Washington before I left.

Mr. Melchior: I would like to offer the paper now identified by the witness as Plaintiff's Exhibit 9. [137]

(Testimony of Lucy K. Cohen.)

The Court: Received in evidence.

(Notes made by plaintiff marked Plaintiff's Exhibit 9 in evidence.)

The Witness: I apologize for the state of it.

Mr. Melchior: Would your Honor like to see the exhibit?

The Court: No.

Q. (By Mr. Melchior): Mrs. Cohen, I would like to show you Plaintiff's Exhibit 8 and ask you whether there is any reference to the time of the departure of your flight from San Francisco.

Mr. Sedgwick: If your Honor please, I think the exhibit speaks for itself. She can testify as to what time she was to leave.

The Court: Yes. All you need to do, Mr. Melchior, is to tell the jury about it.

Mr. Melchior: All right. Fine.

The Court: What does it show?

Mr. Melchior: I would like the jurors to note that about three-fourths down toward the foot of the paper, which is Plaintiff's Exhibit 8, the following is shown in pencil:

"8:14, No. 36, SF-Chicago, 76 times 2, 152. 2 (in a circle)," and then it says "8:45 p.m.—5:02 p.m. (midway)."

On Plaintiff's Exhibit 9, on the reverse, there is [138] written in ink diagonally across the page "TWA St. 3-4200, San Francisco-Chicago, first-class \$114.75, No. 36-Lv SF 8/14, 8/45 a.m. Arr. Chic. 5:20 p.m."

Q. (By Mr. Melchior): Do you recall arriving

(Testimony of Lucy K. Cohen.)

at the lobby of the Maurice Hotel on the morning of August 14th, 1957? A. Yes.

Q. What time did you arrive there?

A. I think it was shortly after seven o'clock.

Q. Did you come down on the elevator?

A. Yes, sir.

Q. What did you do after you arrived in the lobby?

A. I went to the desk to pay my bill and to leave the key. I did those things.

Q. What did you do after that?

A. I went back toward the elevator to wait for my daughter, who was coming down.

Q. Did your daughter arrive?

A. Yes, she came down shortly thereafter.

Q. And at that point what happened?

A. Then we proceeded to the door. Our bags were already in the cab.

Q. What were you wearing at that time, Mrs. Cohen?

A. I was wearing a gray cotton dress, with a little jacket, a hat, no coat, and I was carrying a purse and a little cloth bag. [139]

Q. I show you a pair of lady's shoes, Mrs. Cohen, and ask you whether you can identify these shoes.

A. Yes; these are the shoes that I wore.

Q. On the morning of August 14th?

A. On the morning of August 14th, yes.

Mr. Melchior: I would like to offer the shoes identified just now as Plaintiff's Exhibit 10.

The Court: Received.

(Testimony of Lucy K. Cohen.)

(Pair of shoes were received in evidence and marked Plaintiff's Exhibit 10.)

Q. (By Mr. Melchior): Now, where did you proceed at that point?

A. I was proceeding toward the door, toward the doorway. The door was open on one side.

Mr. Melchior: Just a moment. Before I go on, may I take a moment to show the shoes to the jury, your Honor?

The Court: You can do that after while.

Mr. Melchior: All right. Fine.

The Court: Let's get the examination over with.

Q. (By Mr. Melchior): What transpired at that time? A. I beg your pardon?

Q. Withdraw the question. Who else was in the lobby at that time?

A. As I recall, I think we were the only guests at the time, because it was fairly early. There was my daughter, the manager [140] who was opening the door. A bellman was just outside the door. He had taken our bags out. The taxi man was just outside the door. There was someone at the desk. I don't recall if it was a man or a woman.

Q. Where was your daughter in relation to yourself? A. Just a few steps behind me.

Q. And then as you proceeded out the door did anything happen?

A. Yes. I felt my toe catch in something and I tried to disengage my toe; as I was walking and trying to recover my balance I found myself on the floor, on my knee, right in the doorway.

Q. Do you know on what you caught?

(Testimony of Lucy K. Cohen.)

A. Well, I didn't know it at the time, but when I fell and I was on the ground I looked back and saw that it was a rug.

Q. And where did you land as you fell to the floor?

A. Well, I landed—I don't quite understand.

Q. Where did your body first touch the floor?

A. As far as I can recall, it was on my right knee.

Q. And at what place in the lobby, Mrs. Cohen?

A. Just in the doorway.

Q. Now I will show you Plaintiff's Exhibit 3. Can you show on that exhibit where your body came to rest? Make a cross with this pencil.

A. Well, it was very close to where my daughter did. Shall I circle it? Somewhere in that area (indicating). [141]

Q. And you have initialed where you have circled it? A. Yes.

Mr. Sedgwick: What exhibit is that?

Mr. Melchior: That is Exhibit 3.

The Court: Is this a good point at which to suspend, Mr. Melchior?

Mr. Melchior: I think it will be, yes, your Honor.

The Court: Ladies and gentlemen of the jury, while you are out of the courtroom don't talk about this case, do not permit anyone to talk to you about it. We will be at recess until 10:00 o'clock a.m. January 6, 1959. [142]

(Thereupon an adjournment was taken until

10:00 o'clock a.m. Tuesday, January 6, 1959.)

* * * * *

DONALD MARSHALL

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

The Witness: Donald Marshall, 142 Newman Street, San Francisco.

The Clerk: Occupation?

The Witness: Process server.

The Clerk: Will you spell your last name?

The Witness: M-a-r-s-h-a-l-l.

Direct Examination

Q. (By Mr. Melchior): Mr. Marshall, you are a process server. For whom do you work? [143]

A. Attorneys Messenger Service.

Q. I show you a document, a paper stapled to it which I have shown to counsel and ask you whether you can identify it?

The Court: What is this all about?

Mr. Melchior: If your Honor please, the witness is asked to serve a party whom we wanted to call as a witness in this trial and was not able to find him and make proof of that.

The Court: What has that got to do with it?

Mr. Melchior: If your Honor please, under the Law of California if a witness is not called an inference is raised that his testimony would be contrary to the party who did not call him and we have a right to rebut that by showing that we tried to find him and we couldn't find him.

(Testimony of Donald Marshall.)

The Court: All right.

A. As far as I know this is the paper that I had for him. I don't read them, I just serve them because I have an affidavit that goes with them.

Q. Did you receive a paper which asked you to serve a subpoena on William Lohman?

A. Yes, sir.

Q. Is the paper I have given you a subpoena for Mr. Lohman and a check for his fees tendered with that?

A. As far as I know, there is a check for witness fees on it. [144]

The Court: Who is Lohman?

Mr. Melchior: Mr. Lohman was the photographer who was in the lobby of the hotel.

The Court: You are talking about California Law, we have our own procedure, hasn't anything to do with the State Law. I am not making any point of it one way or the other; if you want to put it in, why, put it in.

Mr. Melchior: All right, I will offer it.

Mr. Sedgwick: I have no objection.

The Court: Received in evidence for whatever it is worth.

Mr. Melchior: I offer the subpoena.

The Court: There isn't any presumption in this court that the testimony would be against you if you didn't call a witness. We are not operating a State Court of California, I told you that last week.

Mr. Sedgwick: I don't believe there is any such presumption in the State Court either, your Honor.

(Testimony of Donald Marshall.)

The Court: There certainly isn't here. We are wasting a lot of time.

Mr. Melchior: Did you try to serve Mr. Lohman, Mr. Marshall? A. Yes, sir.

The Court: That will be all. Step down.

Mr. Sedgwick: Your Honor please, may I ask the witness a question or two?

The Court: Oh, sure.

Cross-Examination

Q. (By Mr. Sedgwick): You say you tried to serve Mr. Lohman? A. Yes, sir.

Q. When?

A. Well, I don't remember the dates, but it was during Christmas.

Q. What? A. During Christmas time.

Q. Wait a minute, you have come here in this court to testify that you made an effort as a professional process server to find Mr. Lohman and you're unable to do so. Do I understand you correctly?

A. That is all I have, his address to go on and I have got a job I work during the day and I only can work nights.

Q. Did you ever go down to that address shown on that subpoena? A. Yes, sir.

Q. When?

A. Right after Christmas and a couple of times before Christmas, to Rollingwood—I can't remember the street that turns off.

Q. On which side of Junipero Serra is it on?

(Testimony of Donald Marshall.)

A. On the right-hand side of Rollingwood. [146]

Q. Which side of Junipero Serra was it on?

A. On the right-hand side going down.

Q. Did you talk to Mrs. Lohman?

A. No, I didn't talk to anybody, there was no answer at the door.

Q. You went once, is that it?

A. I went two or three times, I can't remember. I have about 150 of those stops at night and I can't remember how many stops I make for each of them.

The Court: You don't remember this one, do you?

The Witness: I remember the papers I do serve because of the territories I serve them in. San Bruno happens to be only one that I get three or four in a week for down there and I can't take the time when I have about 150 for Daly City and four for San Bruno to go down to San Bruno and waste an hour down there so I wait until I get enough to make it worthwhile to go down there.

Q. (By Mr. Sedgwick): You haven't been down there since before Christmas, is that your testimony?

A. I was down to San Bruno the other night.

The Court: When? Let's get specific.

The Witness: Well, that paper was turned in—I turned that paper back in the office, I think, a little over a week ago, if I am not mistaken, just before New Year's, I [147] think, I turned that paper back into the office.

(Testimony of Donald Marshall.)

Q. (By Mr. Sedgwick): Did you ever telephone him?

A. No. Like I say, I work during the daytime and when I get off—I work at Gallenkamp's during the daytime and when I get off at 6:00 and I don't get started until about 7:00 o'clock by the time I go home and eat and get going.

Q. Do you have his telephone number?

A. No, I don't.

Q. Well, let me give it to you. You can call him. He is there any time you want to call him and so is his wife. If you really wanted him you could go down and get him right now. The telephone number is Juno 3-9696. Do you want to make a note of it?

Mr. Melchior: Is counsel testifying here? I object to counsel's statement.

The Court: You started this, counsel; we are going to see it through.

Mr. Melchior: That is very well with me, but I am not going to have counsel testify. I object to it, your Honor.

The Court: The objection is overruled. He isn't testifying. All he is giving is the process server a telephone number of the witness that you say you can't produce. If not, counsel is showing how you can get him.

Mr. Melchior: There is no proof that counsel has [148] given this witness the right telephone number.

The Court: The objection is overruled, we don't tolerate that sort of argument.

(Testimony of Donald Marshall.)

Mr. Sedgwick: Juno 3-9696.

A. What is that address again, please?

Q. The address is—— A. 120?

Q. —Birch Court, San Bruno.

A. And the name?

Q. Richard Lohman, L-o-h-m-a-n.

Mr. Sedgwick: I have no further questions, your Honor.

The Court: All right.

Mr. Melchior: That is all.

The Court: Have anything further?

Mr. Melchior: No, your Honor.

The Court: The witness is excused. All right.
Step down.

(Witness excused.)

Mr. Melchior: Mrs. Cohen, please.

LUCY K. COHEN

the plaintiff herein, recalled as a witness in her own behalf, resumed the stand, being previously duly sworn, testified further as follows: [149]

Direct Examination—(Continued)

Mr. Melchior: Your Honor, I believe these shoes haven't yet been shown to the jury.

The Court: What is that?

Mr. Melchior: I would like to show the shoes to the jury at this time.

The Court: All right.

Q. (By Mr. Melchior): Mrs. Cohen, when we

(Testimony of Lucy K. Cohen.)

recessed I believe the last question was how you happened to fall. What was your answer to that?

Mr. Sedgwick: Excuse me. If your Honor please, I believe the record will speak for itself as far as her answer may have been. That's not a question.

The Court: We are not going to repeat the testimony.

Q. (By Mr. Melchior): Where did you land at the time of your fall, Mrs. Cohen?

A. Right in the doorway of the hotel on a marble slab.

Mr. Melchior: I am sorry, I see the place has already been marked and shown to the jury.

Q. Can you recall how your foot caught at the time of your fall?

A. Well, as I recall something caught my foot as I was walking and I tried to recover my balance and wasn't very [150] successful and the next thing I knew I was down in the doorway on the marble door jamb on my knee.

Mr. Sedgwick: Your Honor please, could I have that answer read?

(Record read by the reporter.)

Mr. Sedgwick: Thank you.

Q. (By Mr. Melchior): Do you know what it was that caught your foot?

A. Yes, it was the rug.

Q. Do you know what part of the rug?

A. I beg your pardon?

Q. Do you know what part of the rug?

A. It was the edge. I saw that afterwards.

(Testimony of Lucy K. Cohen.)

Q. Now, prior to that time had you ever had any slips or falls or breaks of any kind?

A. I have had, well, I imagine I must have as a child fallen, but I have had no breaks, no injuries of any sort.

Q. As an adult did you have any falls?

A. No, sir.

Q. Will you state whether or not you had any warning of any untoward condition of any kind as you proceeded through the lobby?

Mr. Sedgwick: Just a minute, if your Honor please. That most certainly, in my opinion, would be a self-serving statement and a conclusion of the witness, certainly not a factual matter. [151]

The Court: Yes. Objection sustained.

Q. (By Mr. Melchior): Did you notice anything unusual or out of the ordinary as you walked through the lobby? A. I did not.

Q. Now, will you state to what your attention was directed as you came through the lobby up to the moment of the fall?

A. As I recall I was—the taxi was waiting outside and we were going towards the taxi. The bellman was just outside the door. I hadn't tipped him yet, I think he was probably waiting for his tip. As I also recall the manager was over to one side, we had just said good-by. Other than that I don't think my attention was diverted by anything.

Mr. Melchior: I didn't hear the whole of the answer. May I have that last part?

(Record read by the reporter.)

(Testimony of Lucy K. Cohen.)

Q. (By Mr. Melchior): When you landed on the marble slab, Mrs. Cohen, did you experience any sensation?

A. Yes, it was the worst pain I think I have ever suffered in my life. It was a most excruciating pain.

Q. What was the place of the pain?

A. Well, I assume—it was largely centered in my right leg around my knee.

Q. Can you describe the nature of this pain?

A. Well, it's a difficult matter to describe it, but as I remember it was about the worst pain I have ever suffered.

Q. What did you do?

A. I just asked to be left alone.

Q. What happened thereafter?

A. One of the hotel employees, I don't—I think it was the bellman, who was at the door, picked me up under the arms and kind of half dragged me to a settee in the lobby.

Q. Can you keep your voice up a bit, please?

A. I will try. I am sorry.

Q. When you were sitting on the couch, on the settee in the lobby, did you look over toward the rug in question?

A. Yes, I did, I was very much concerned what had caused the accident.

Q. You will have to keep your voice up, please. I have a difficult time hearing you.

What did you see?

A. As I looked back over the rug I saw that

(Testimony of Lucy K. Cohen.)

it was somewhat wavy at the point where my foot caught.

Q. What point was that, madam?

A. That was at the edge of the rug—there were two rugs and this is at the edge of one between two pillars, as I recall.

Q. Now, at that point did anyone come over and speak with you? [153]

A. Well, everyone at the hotel, on the hotel staff, those were the only ones in the lobby at the time, were hovering around me, the bellman and the elevator man and the manager. There was someone at the desk but I don't think that person, I don't remember whether a man or woman, left the desk. My daughter was there going back and forth making telephone calls. I don't remember whether the taxi man ever came into the lobby. He had been outside the door.

Q. At the time did anyone say anything to you about the condition of the rug before the accident? Just answer yes or no, please.

A. Yes.

Q. Do you recall who said this?

A. No, I don't recall who said it. I'm sorry. But I think it must have been one of the hotel employees, because they were the only ones there at the time.

Q. There was no one present except the hotel employees?

A. And my daughter who, I think at this point, was calling the doctor, or a doctor.

(Testimony of Lucy K. Cohen.)

Q. And this took place at what time? Immediately after the accident? A. Yes.

Q. In the lobby of the hotel?

A. In the lobby.

Q. What did this person say? [154]

Mr. Sedgwick: Just a minute, if your Honor please. I am going to object to that as hearsay, without any proper foundation made as to the identity of the person who supposedly made some admission, I take it is the purpose of the question.

Mr. Melchior: That is the purpose of the question. I respectfully submit, your Honor,—

The Court: Who was the individual now whose statement you are offering?

Mr. Melchior: The lady has testified, your Honor, that there were three employees present and no other person and she can't identify—

The Court: An employee of the concern?

Mr. Melchior: Yes, your Honor.

The Court: Better lay the foundation. Let's get the foundation.

Q. (By Mr. Melchior): Was there anyone present, Mrs. Cohen, except for the three persons you have described, the bellman and the elevator man and the manager? A. No, sir.

Q. Now, one of these three made a statement, is that correct? A. Yes, sir.

Q. Do you recall which one of them?

A. No, I don't recall which one of them, because they were [155] all hovering over me. I guess I didn't look up to see who said what.

(Testimony of Lucy K. Cohen.)

Q. Was there any other person besides those three present? A. No.

Q. Do you have any doubt about that whatever?

A. None whatsoever.

Q. Now, do you recall what this one person of those three said at that time?

Mr. Sedgwick: Same objection, your Honor, hearsay and no proper foundation laid as to the identity of the person or the fact of agency.

Mr. Melchior: I am going to submit it, your Honor, on the basis that the lady has identified the three persons present, all employees of the hotel, therefore the agency is established even though under the circumstances she did not determine which of the three actually made the statement.

The Court: The doorman, the bellman and the manager—

Mr. Melchior: The elevator man, the bellman and the manager, yes, your Honor.

The Court: The elevator man, the bellman, the manager. Well, do elevator operators have any authority to make speeches for the employer?

Mr. Melchior: Well, I don't think it is a matter of making a speech, it's a statement, going to be a statement about the condition of the premises.

The Court: I understand. Does the elevator [156] operator have any authority to—in other words, is he hired to make statements? That is what we are talking about.

Mr. Melchior: Well, in the strict sense of that question, your Honor, I think no one is ever hired

(Testimony of Lucy K. Cohen.)

to make statements, but if the statements are approximately related to the nature of the employment I think that—

The Court: That is what I am talking about. Has the statement any relation at all to his employment. He is the operator of an elevator.

Mr. Melchior: I think it is.

The Court: A manager, that is something else again. Maybe the doorman—maybe the doorman, if an accident occurred in the doorway, fell in the doorway. There are three individuals. If any one of them is not able to bind the owner of this property, why, you haven't established a foundation for your question, that is what I am coming at. I don't mean to indicate my views on it, but there is a problem involved.

Mr. Melchior: I agree with that, your Honor, and I am going to have to submit it as is.

The Court: The problem involved. Now, the law on the subject—have you looked up the law on that subject? What is the law on that subject? [157]

Mr. Melchior: I think I have an idea I can connect this up through establishing a scope of the authority of these persons.

The Court: Well, you are going to have to do that before we get that declaration before the jury.

Mr. Melchior: Well, I can't do it through this witness, your Honor.

The Court: All right.

Q. (By Mr. Melchior): Mrs. Cohen, when you stayed at the hotel, from the time you arrived until

(Testimony of Lucy K. Cohen.)

your accident, did anyone say anything to you, did anyone on the part of the hotel say anything to you about the condition of this rug? Just answer yes or not. A. No, sir.

Mr. Sedgwick: The answer was no?

The Witness: No, sir. [158]

* * * * *

Q. (By Mr. Melchior): Now, did your hospital stay interrupt any plans with respect to your employment in the East, Mrs. Cohen? A. Yes.

Q. What was the nature of those plans and the nature of the interruption. [172]

A. I was, I think I said this, I was employed by the President's Committee on Scientists and Engineers and the appointment ran until the 30th of September. At that time I had an opportunity to make a change for a permanent job, and while I was in the hospital notification of a new appointment came to me.

Q. Came where?

A. To Washington. It was just by accident—

Q. Where in Washington?

A. At my home in Washington. It was just by accident. It was just by accident someone looking after the cats noticed that there was a letter from the Civil Service Commission, thought it might be important and sent it along. When I received it the time had expired when I could accept the appointment, but—

Q. Where did you receive it?

A. In the hospital. But I telephoned the Public

(Testimony of Lucy K. Cohen.)

Health Service and spoke to the Personnel Office and then sent them a letter saying if it was not too late I was still interested in the job.

Q. Mrs. Cohen, I show you a letter and ask you whether you recognize this?

A. Yes, it is the letter that I wrote when I was in the hospital and sent to the Personnel Office of the Public Health Service in Washington. [173]

Q. Did you sign this document at the time you were in the hospital? A. Yes, I did.

Mr. Sedgwick: Your Honor please, I am going to object to this; incompetent, irrelevant and immaterial. It adds nothing to her testimony, just a recapitulation, immaterial one way or the other, but we are loading the record here with a lot of documents that, it seems to me, is unnecessary.

The Court: Hasn't her testimony covered everything?

Mr. Sedgwick: It has, your Honor.

Mr. Melchior: I would like to offer this letter, your Honor, it indicates the nature of the lady's anxieties and problems with respect to securing her employment, it was actually very dangerous for her—

The Court: A letter she wrote?

Mr. Melchior: A letter she wrote while in the hospital to her employment supervisor at the Public Health Service.

The Court: Objection sustained.

Mr. Melchior: I would like to have the document marked for identification.

(Testimony of Lucy K. Cohen.)

The Court: All right, mark it for identification.

The Clerk: Plaintiff's Exhibit 15 for identification only. [174]

(Whereupon an unidentified letter written by Mrs. Cohen to Public Health Service marked Plaintiff's Exhibit 15 for identification only.)

Q. (By Mr. Melchior): Mrs. Cohen, did you make any telephone calls as the result of your accident, long distance telephone calls?

A. Yes, I did, I called my home, I called the office, I called a lawyer in Washington who could take care of things and as a matter of fact I sent him a power of attorney so I could have some money in the bank with which to pay the hospital bills.

Q. What was the need for the power of attorney?

A. Well, I had no money in the bank and I did have a little in savings.

Mr. Sedgwick: If your Honor please, I am going to ask that last answer be stricken as not responsive, ask also for the opportunity to object to this as completely incompetent, irrelevant and immaterial, has nothing to do with this case whatsoever. A self-serving declaration.

The Court: I think you are correct, counsel. You are going into a great detail about a lot of things that seem to me to be quite tenuous here, have her lawyer go down to the bank and switch funds from one account to the other. That is what you are talking about, isn't it?

Mr. Melchior: That's not all, your Honor. I am

(Testimony of Lucy K. Cohen.)

[175] sorry, with great respect I would like to note an objection to your Honor's statement that this is a tenuous matter.

The Court: Well, you may have your objection.

Mr. Melchior: Thank you, your Honor.

The Court: And I will repeat it, I think it is quite tenuous and the objection is sustained on that ground.

Q. Mrs. Cohen, did Mr. Schifter, the attorney in Washington, render you any other services with respect to taking care of your Washington affairs as a result of your inability to be in Washington?

A. Yes, he did.

Q. Will you state the nature of the services that he rendered to you?

A. Yes, he not only took care of me, see that I had some money to pay bills with, but he also took care of arrangements for my home and my younger child and my employment.

Q. Where was your younger child at this time?

A. In New York State.

Q. Did Mr. Schifter charge you for these services? A. Yes.

Q. How much did he charge you? A. \$150.

Q. Now, when did you return to Washington, Mrs. Cohen? A. On the 28th of August.

Q. Did you have additional expenses with respect to your [176] return to Washington which related directly and proximately to the accident?

Mr. Sedgwick: If your Honor please, I must object to the form of the question, relating di-

(Testimony of Lucy K. Cohen.)

rectly and proximately, that is for the jury to determine.

Mr. Melchior: All right.

The Court: Yes.

Mr. Melchior: I will withdraw it.

Q. Did you have additional expenses in connection with your return home?

A. Yes, I had to change my airplane ticket to first class fare.

Q. Why was that? Why?

A. Why, because I needed special care and space. Actually I was given two seats. I also had additional baggage because I had additional clothing that had been purchased while I was here.

Q. How much money did the additional fares and baggage on your return to Washington cost you?

A. The fares, baggage and porter came to about \$107 and some cents, I don't remember the exact amount.

Q. Were you able, at the time of your return to Washington, to move your leg freely, Mrs. Cohen?

A. No, it was in a cast, I couldn't move it at all.

Q. Would you explain how you managed locomotion at that time? [177]

A. Well, through the kindness of one of the doctors at the hospital and one of the nurses, they devised a system whereby I could sit on a board and pull the cast up with a hook made out of a coat hanger.

(Testimony of Lucy K. Cohen.)

Q. Now, Mrs. Cohen, I show you a board and ask you what that is?

A. This is the board that one of the nurses got for me so I could travel, be able to sit in a plane.

Mr. Melchior: Offer the board as plaintiff's exhibit next in order.

Mr. Sedgwick: No objection, your Honor.

The Court: Received.

The Clerk: Plaintiff's Exhibit 16 in evidence.

(Whereupon the board above referred to was marked Plaintiff's Exhibit 16 in evidence.)

Q. (By Mr. Melchior): I will show you something made from a clothes hanger, and would you state what that is?

A. Yes, that was something devised by the doctor in the hospital so I could pull the cast up.

Q. Was this what Dr. Fixler devised, then?

A. This is the hook, this is the shape.

Q. Same shape, is it?

The Court: Well, counsel, you don't need to go into such great details on this. [178]

Mr. Melchior: Very well. Offer this as plaintiff's exhibit next in order.

Mr. Sedgwick: No objection.

(Whereupon the device above mentioned was marked Plaintiff's Exhibit 16-A in evidence.)

Q. (By Mr. Melchior): Mrs. Cohen, I would like to show you and hand you plaintiff's Exhibit 16 and 16-A and ask you to show to the jury just how you used these exhibits.

The Court: Well, I am not going to permit you

(Testimony of Lucy K. Cohen.)

to make that demonstration. It's an obvious matter. We have all understood that since you made the opening statement. Proceed.

* * * * *

Q. (By Mr. Melchior): Mrs. Cohen, I show you a photograph and ask you what this is and when it was taken?

A. This was taken while I was wearing the cast and before I went back to work in Washington in my own home.

Q. What does it show?

The Court: Well, the exhibit will speak for itself when you get it in, if you do. [179]

Mr. Sedgwick: May I see it?

Mr. Melchior: Offer it as an exhibit.

Mr. Sedgwick: May I have a moment to look at it, your Honor?

The Court: Sure.

Mr. Sedgwick: May I ask the witness a question?

The Court: Yes.

Q. (By Mr. Sedgwick): Do I understand you to say this was a picture that was taken before you went back to work?

The Witness: Yes.

Mr. Sedgwick: You went back to work, I believe, on—

A. October 14.

Q. October 14? A. Yes.

Q. Who took the photograph?

A. My daughter, my younger daughter.

(Testimony of Lucy K. Cohen.)

Q. Where was it taken?

A. In my backyard.

Q. How long before you went back to work, approximately, was it taken?

A. I am sorry, would you read that?

Q. Certainly. About how long before you went back to work was that picture taken?

A. Oh, I don't recall exactly, but I would say three weeks or so before I went back to work. [180]

Q. Sometime around the middle of September, then?

A. Towards the end of September, I would say.

Mr. Melchior: Offer the photograph as plaintiff's Exhibit 17.

The Court: Received.

Mr. Sedgwick: I have no objection, your Honor.

The Clerk: Plaintiff's Exhibit 17 in evidence.

(Whereupon the photograph above referred to was marked Plaintiff's Exhibit 17 in evidence.)

Mr. Melchior: I would like to show the exhibit to the jury, if your Honor please, and I will continue my examination of the witness.

(Showing photograph to jurors.) [181]

* * * * *

Q. Mrs. Cohen, I would like you to tell the Court and jury just how this accident has affected your life or what effect it has had with respect to what you have been able to do and are no longer able to do and how it has made you [195] feel and how it has affected you in the society of persons.

(Testimony of Lucy K. Cohen.)

Mr. Sedgwick: Excuse me. If your Honor please, may I have the question reread?

The Court: Yes, read it.

(Record read by the reporter.)

Mr. Sedgwick: If your Honor please, first it is compound, it is about four questions, and I think I will object to it on that ground. Also it is a self-serving declaration, incompetent, irrelevant and immaterial.

The Court: Well, to cover the ground just ask how it has affected her life.

Mr. Melchior: All right, I will do that, your Honor.

The Court: All right.

Q. (By Mr. Melchior): Mrs. Cohen, how has the accident affected your life?

A. I will try to be as brief as I can. It just isn't the same life I had before. I am always aware of the leg. I must spend a good deal of every working day looking after it. I am no longer able to do ordinary household chores and I am no longer able to engage in the ordinary activities and exercise which were very important and maybe a necessary part of my life. I am no longer able to work as I had before, do what I did, and as a matter of fact there was an unfinished manuscript for which I may never be paid. I just am no longer [196] a member of ordinary society because I just don't have time or energy to engage in social activities. I would say my children hardly recognize me.

Q. Mrs. Cohen, I am going to show you three

(Testimony of Lucy K. Cohen.)

pictures, and ask you whether you appear in these pictures and when the pictures were taken.

A. Yes, they are pictures of me taken in 1957. This one—it has no number—throwing a ball was taken in March and the other two in either June or July of 1957 just before the accident.

Mr. Melchior: I would like to offer these three pictures identified by the witness as one exhibit next in order.

Mr. Sedgwick: To which we will object, your Honor, incompetent, irrelevant and immaterial, self-serving, having nothing to do with this case.

The Court: What is the date of these pictures, counsel?

Mr. Melchior: Mrs. Cohen testified the one throwing the ball is March of 1957 and the other two were taken in June or July of 1957.

The Court: I don't think they would serve any useful purpose. Immaterial. The objection is sustained.

Mr. Melchior: I would like to have these marked as an exhibit. [197]

The Clerk: For identification. Plaintiff's Exhibit No. 18 for identification only.

(Photographs above referred to were marked Plaintiff's Exhibit 18 for identification only.)

Mr. Melchior: Cross-examine, please.

The Court: Well, we will start cross-examination after lunch.

Mr. Sedgwick: Yes, your Honor.

(Testimony of Lucy K. Cohen.)

The Court: How many witnesses are you going to have?

Mr. Sedgwick: Your Honor, I think we will have four, perhaps five.

The Court: I take it this is your last witness?

Mr. Melchior: This is my last witness, yes, your Honor.

The Court: All right, we will be at recess until 2 o'clock, ladies and gentlemen of the jury. Don't talk about this case while you are out of the courtroom, don't permit anyone to talk to you about it.

(An adjournment was taken until 2:00 p.m. this date.) [198]

Afternoon Session—Tuesday, January 6, 1959
2:00 P.M.

Mr. Sedgwick: Proceed, your Honor?

Cross-Examination

Q. (By Mr. Sedgwick): Mrs. Cohen, just before the noon recess you had told us that you were unable to do your ordinary household chores, I believe is the term you used? A. Yes.

Q. You said you couldn't carry the washing up and down the stairs and I believe you said something else that I didn't get.

A. I am sorry, doing ordinary—taking the trash and garbage, we must take it to the basement and outside in our house.

Q. So that other than those two particular things you have mentioned, you are able to do—

(Testimony of Lucy K. Cohen.)

A. There were other things I mentioned. I don't remember all of them.

Q. I beg your pardon?

A. There were other things that I mentioned that I don't remember.

Q. What were they?

A. Things such as fixing, just putting the plug in the wall socket, I can't bend down that far, had to lay down on the floor, little things like that. [199]

Q. All right. Can you think of anything else other than what you have told us, or is that about it?

A. No, it doesn't complete it, there were many things, like working in the—we have a rather large garden, we grow our own vegetables, and so on, I can't do some of the heavy work which I had been able to do before.

Q. What heavy work do you refer to?

A. Digging, planting.

Q. Inside the house, other than the things you have told us about, you are able to get around, are you not?

A. Up to a point. If I stand, for any length of time, even doing dishes, I find my leg swells so I must stop. The same thing with cleaning.

Q. How many live in your house, what does your household consist of?

A. When my oldest daughter is at home, and my younger daughter, myself, two cats and someone who comes in and helps me now.

Q. Is your younger daughter living with you all the time? A. Yes.

(Testimony of Lucy K. Cohen.)

Q. How old is she? A. 15 now.

Q. Your older daughter is how old?

A. She is just past 19 now. [200]

Q. She is going to school? A. Yes.

Q. Where?

A. University of Rochester, up in New York State.

Q. So that during the school terms, at least, there is yourself and your younger daughter aged 15 living in the house? A. Yes.

Q. You have full-time household help for that?

A. Yes.

Q. All right. Now, you told us something about that you had an expense of \$50 in connection with the National Symphony. What was that?

A. I have been a member of the Women's Committee of the National Symphony for about 20 years and every year I buy tickets and go to the concerts. I did the same thing this last year and couldn't use them because they are in the tiers and you had to climb up——

Q. Because they were what?

A. They were in the tiers and you had to climb up and I couldn't sit that long.

Q. Are you talking about 1958 or 1957?

A. 1957-58.

Q. How often do you go swimming?

A. Three or four times a week now.

Q. How long do you swim? [201]

A. Oh, I have a regular set procedure, a certain number of times up and down the pool, a certain

(Testimony of Lucy K. Cohen.)

number of scissor kicks, a certain number of bicycle kicks.

Q. How many times do you go up and down the pool?

A. Four times at least, depends on how much time I have.

Q. How long a pool is it?

A. Oh, I have never measured it, I don't know what the Y pool is. I am sorry. It is a good-sized pool.

Q. You do that, you say, four to five times a week? A. Three or four times a week.

Q. What is this bicycle riding that you do?

A. I have a stationary bicycle at home for the muscles.

Q. You do that at home? A. Yes.

Q. How much time do you put on that a day?

A. Usually in the evening, I don't have time to do it in the morning when I wake up.

Q. How long do you do it?

A. The whole series of exercises takes about an hour.

Q. You said you earned about a thousand dollars a year editing something. What was that?

A. Well, over the years I have done editing for the National Bureau of Economic Research and I edited my father-in-law's papers.

Q. Your what? [202]

A. My father-in-law's papers for a publisher, for which I was paid, and I am in the process of

(Testimony of Lucy K. Cohen.)

editing now, but I haven't been able to do much in the last year, for the Yale Press.

Q. Do you have with you any evidence of payment of these bills or the thousand dollars a year for editing?

A. No, but I could supply them if you need them.

Q. Do you have any copies of income tax returns, anything of that kind that would show that income?

A. Not with me, sir, but it has appeared.

Q. The reason you don't do that now is because you don't have the energy to do it, am I correct?

A. Yes, sir. My papers, as a matter of fact, are in the Library of Congress and they were left there just before I took this trip. I was given a cubicle to work in and all the papers are still there, I hope.

Q. You told us that you had incurred an expense of, I believe it was \$150 in attorney's fees in Washington? A. Yes, sir.

Q. While you were out here. What was the name of that lawyer, Schifter?

A. Yes, Richard Schifter.

Q. Your husband was a lawyer, was he not?

A. Yes, sir.

Q. And Mr. Schifter was a partner of your husband's? [203]

A. No, he was not. He worked in my husband's office. I don't know what the relationship was.

Q. Well, he works in your husband's office, and is still in that office?

(Testimony of Lucy K. Cohen.)

A. Well, it is no longer my husband's office, he is dead.

Q. Your husband's name is still on the letter-head, isn't it?

A. I think it is, with the date of his death.

Q. Still on the name? A. Yes.

Q. And it was one of the attorneys in that office that charged you \$150 for helping you out while you were out here? A. Yes.

Q. Is that right?

A. On my insistence, because he did go to a lot of trouble.

Q. Now, you told us that you lost 34 working days while on this temporary job for some commission. What was the name of that commission?

A. The President's Commission on Scientists and Engineers.

Q. Was any of that 35 days or 34 working days that you told us about at \$35 a day taken care of by any sick leave? A. No, sir.

Q. How about the time that you go to the—you told us that you lost 5 hours a week since this accident on an average. [204] Has any of that been taken care of by sick leave or by vacation?

A. As I say, it comes out of my sick leave and annual leave because I must do it during the working day.

Q. Then you actually were not docked this \$1600?

A. No, but if I have any illness of any kind—

Q. But my point is that is not anything that

(Testimony of Lucy K. Cohen.)

you paid and you were not docked that, were you?

A. Well, I was on leave without pay for two weeks at the beginning of it.

Q. That's before you started the job?

A. Well, I was on the payroll, but it was on leave without pay.

Q. That's the 10 days that you told us about for which you have down \$350, isn't that correct?

A. Yes, sir.

Q. Now, I am talking about this next item, \$1600, that you told us about which represents time lost for going to the physiotherapist. A. Yes.

Q. You actually didn't lose that money, that came out of your sick pay?

A. Well, some of it came out of my sick pay, some came out of my annual leave, some of it came out of leave without pay if I had no annual leave, sir.

Q. Now, going back to the facts of the accident, [205] Mrs. Cohen, did you call for the taxicab yourself or did you ask the hotel operator to do it for you?

A. I believe we asked the hotel operator to do it.

Q. Did it come right away?

A. I assume so. I don't know. I don't remember whether it came right away; I assume it did.

Q. Did you remain in the lobby from the time the operator called for the taxicab until it arrived?

A. No, I believe they called the taxi, I think,

(Testimony of Lucy K. Cohen.)

at the time were were upstairs, I am not sure. I think they called it before we went downstairs.

Q. Didn't you come downstairs and have a discussion with the clerk as to how to get to the airport and the time it took and that sort of thing?

A. No, sir, because in the first place I always go by cab to airports, I don't use the limousine, at least in Washington.

Q. I'm sorry.

A. I say, when I go to an airport I always use a taxi rather than a limousine in Washington, because they go by a circuitous route. Secondly, I didn't know how far it was to the airport because I don't know—I didn't at least then know San Francisco very well.

Q. How did you arrive in San Francisco?

A. By bus from Sacramento. [206]

Q. You have never been to the San Francisco Airport before?

A. Well, in 1950 we came by air from Portland, but I don't remember whether it was to this particular airport or another. I think at that time there was some difficulty on weather, so I don't remember. That was 1950 and was the last time I had come in.

Q. Isn't it a fact that you came down and talked to the clerk at the desk in the hotel about how to get to the airport, how long it takes and that sort of thing?

A. I don't remember that I discussed how long

(Testimony of Lucy K. Cohen.)

it took, because I assume the hotel would take care of its guests.

Q. I am sorry. I didn't hear your answer.

A. I say I don't recall that I discussed how long it would take because I left it with the hotel to take care of such matters.

Q. You left it to the hotel to take care of what matters?

A. The matter of calling the taxi and allowing enough time, and such things.

Q. Did you tell someone at the hotel what time your plane left?

A. Well, I assume they knew what time the plane left and asked to call at a certain time, which they did.

Q. You assumed that they knew what time your plane left?

A. I asked them to call us in time for us to make the [207] plane for which we had reservations.

Q. I am not sure I understand you. You left a call before you went to bed the night before?

A. I don't—yes. I think we must have, because we knew what plane we were leaving on.

Q. Who knew what plane you were going to take? A. My daughter and I.

Q. Did you tell anybody there the time your plane was leaving?

A. I may have told them the night before when we made arrangements to be called the next day. I don't recall doing that in the morning as I was about to leave.

(Testimony of Lucy K. Cohen.)

Q. In other words, you left it up to the hotel people to get you up at the right time and get your taxi there?

A. We arranged for it some time ago, I don't recall now whether it was 7 or 6:30. I don't remember.

Q. Who did you arrange for it with?

A. Whoever was on the switchboard at the time, I don't know.

Q. Did you do that the night before?

A. The night before.

Q. The night before? A. Yes.

Q. I see. So that if I understand your testimony, then, you arranged with someone at the desk the night before? A. Yes. [208]

Q. You were to leave to awaken you in time to reach the airport in time to take your plane?

A. Yes.

Q. Is that right? A. I believe so.

Q. And you don't remember telling them what time the plane left?

A. I don't remember, but I'm sure I must have.

Q. You don't remember having a discussion with the hotel clerk when you came downstairs that morning as to questioning him as to what time you must allow to get to the airport? A. No, sir.

Q. That sort of thing? A. No.

Q. And you ordered a taxicab to go to the airport, then? A. They ordered it for me.

Q. But you intended to take the cab directly to

(Testimony of Lucy K. Cohen.)

the airport and not down to the bus or the limousine? A. Yes, that's right.

Q. And it's your statement you always take taxicabs to airports?

A. We do in Washington, because it's just more expensive and it's circuitous.

Q. Well, how about at the other places you go?

A. I don't travel around much by airplane. [209]

Q. Well, you say you always do it in Washington. Where do you go from Washington?

A. If I do go to New York to visit my parents, I usually take a taxi.

Q. Now, you said that you spoke to the manager before you left. Do you recall that?

A. I don't understand your question. At what point do you mean?

Q. Before you started out to go to the taxicab did you talk to the manager of the hotel?

A. I assume we said goodbye at the desk after I paid my bill. He did speak with me later, too, after the accident.

Q. Now, you know the manager's name is Mr. Hoffer, don't you? A. Yes.

Q. And you knew him there at that time when you were at the hotel?

A. Well, I knew him in the sense that I have met him the night before and that morning, but I didn't know him otherwise, except by a letter of introduction.

Q. You had a letter of introduction to him, didn't you?

(Testimony of Lucy K. Cohen.)

A. Yes, I have it here, that is, the letter came through the mail.

Q. And so you talked to him the night before the accident [210] and you talked to him in the morning before the accident, is that your testimony?

A. I assume I talked to him the night before. I don't recall he was in the lobby when we arrived.

Q. You talked to him in the lobby, didn't you?

A. Yes.

Q. I am asking you now for your testimony on your recollection of these matters. Perhaps we can refresh your memory a bit, Mrs. Cohen. May I refer to the original deposition, if your Honor please?

The Court: Yes.

Q. (By Mr. Sedgwick): May I ask you, Mrs. Cohen, unless counsel will stipulate these questions were asked and answered—I am referring to page 14, line 10.

Mr. Melchior: We will stipulate.

Mr. Sedgwick: Thank you. Referring, then, if your Honor please, to the deposition of Mrs. Lucy Cohen taken in Washington, D. C. on June 17, 1958 at 1625 K Street, N.W., Washington, D. C., at 4 o'clock p.m. you were there with your attorney, your Washington attorney?

The Witness: Yes.

Q. (By Mr. Sedgwick): Mr. Schifter that you have mentioned? A. Yes.

Q. You were sworn to tell the truth, just as you

(Testimony of Lucy K. Cohen.)

were here, [211] you were questioned regarding the facts and circumstances of this accident?

A. Yes.

Mr. Sedgwick: I read, then, if your Honor please, page 14, line 10 to line 25.

"Q. And was it while you were there that your daughter came down?

"A. Now that I think, I had already paid the bill and the bags were down in the taxi and we wanted to say our proper farewells to the manager.

"Q. Did you say farewell to the manager?

"A. Yes. You see, the hotel had been rather highly recommended by someone who had used it for 25 years, and I think he took a special interest in us. That was all.

"Q. Did you know him?

"A. No, except that I received a letter from him confirming the reservation.

"Q. You don't by any chance recall his name?

"A. Yes, Mr. Hoffer as I recall.

"Q. Did you speak with him just before you left? "A. Yes.

"Q. Was he there in the lobby?

"A. Yes, he was there."

Q. Does that refresh your memory? [212]

A. I said he was in the lobby.

Q. That wasn't the man that you paid, that was the clerk?

A. Whoever was behind the clerk is the person I paid the bill to.

Q. Yes. So after you paid your respects to Mr.

(Testimony of Lucy K. Cohen.)

Hoffer, as you state there, is it your testimony that is when you started out to go to the taxicab?

A. No.

Q. What did you do after that?

A. As I recall I came back near the elevator and waited for my daughter to come down.

Q. Where was Mr. Hoffer in the lobby when you talked to him?

A. I believe he was over near the desk.

Q. Over near the desk?

A. Which is on the left side as you walk out.

Q. All right, how long after you said goodbye to Mr. Hoffer was it that you started out?

A. When my daughter came down, I don't know, five minutes, whatever it was.

Q. As you started out the lobby of the hotel you were heading towards the glass doors at the front entrance, were you not? A. Yes.

Q. Were you looking down watching where you were going? [213]

A. Yes. I wasn't looking at my feet, but I was looking ahead as one usually does when one walks.

Q. Were you looking ahead of you a matter of a few feet ahead as you were walking?

A. I assume so.

Q. I beg your pardon?

A. I assume I was looking ahead of me.

Q. All right. Well, did you notice as you were walking toward the door, you approached this rug, which is shown in Plaintiff's Exhibit No. 2 and Plaintiff's Exhibit 1, did you notice the carpeting

(Testimony of Lucy K. Cohen.)

in the condition that is shown on these photographs?

A. I noticed that there was a space between the carpets when I started from about here. When I started to walk I was about over here (indicating).

Q. Would you mind taking your finger and pointing to that spot?

A. I was standing somewhere along in here waiting for my daughter to come. The elevator is over here on this side (indicating).

Q. Well, my question is, you had started to walk towards that carpet?

A. Only after she came down.

Q. After she came down you started toward the carpet? A. Yes, towards the door. [214]

Q. Towards the door and across the carpet?

A. Yes, towards the edge of the carpeting.

Q. Well, on Plaintiff's Exhibit 2, you have made a mark, an X mark as to where you think your foot caught have you not? A. Yes.

Q. So then you did go towards this carpet where you testified that you fell?

A. I said that, sir.

Q. All right. Now, did you, as you approached the carpet, see or notice it in a condition as shown in these exhibits, Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2?

A. I didn't see it in just that form because I wasn't looking there, I was looking ahead.

The Court: You will have to lift your voice. I couldn't hear what you said and I know those jurors can't.

(Testimony of Lucy K. Cohen.)

Mr. Sedgwick: May we have the answer read?

(Record read by the reporter.)

Q. (By Mr. Sedgwick): Regardless of where you were looking you never did at any time before your fall notice that carpet in the condition that is shown in the photographs which are Plaintiff's Exhibit 1 and 2, did you?

A. That's right, sir.

Q. All right. As a matter of fact, Mrs. Cohen, you were concerned about that carpet, weren't you? You wanted it straightened out because your daughter was walking behind you [215] and you were concerned for her safety. Isn't that true?

A. It was after I fell that I noticed that.

Q. May I refer, if your Honor please, to the deposition of Mrs. Cohen on page 18, lines 7 to 13.

"Q. I believe you stated that the fact that the rug was loose—you could not see it before you fell?

"A. I was quite concerned about it, I remember. I wanted them to straighten it out because my daughter was right behind me.

"Q. Your daughter was right behind you?

"A. Yes."

Q. You did give that testimony, did you not?

A. I believe that was corrected; it was one of the corrections that wasn't accepted, I think, I am not sure.

Q. You think it was corrected?

A. I think so, but I am not sure.

Q. You have made some 50 corrections on the deposition.

(Testimony of Lucy K. Cohen.)

Mr. Melchior: I will stipulate that it was not corrected, if that is helpful, counsel.

Mr. Sedgwick: Well, it wasn't corrected. If you stipulate to it we won't have to take any more time.

The Court: That was her testimony, was it?

Mr. Melchior: That was her testimony.

The Court: And it is not corrected?

Mr. Melchior: Not corrected. [216]

Mr. Sedgwick: It is not corrected.

Q. Now, did the manager see you fall, Mr. Hoffer? A. Yes.

Q. It is a fact, is it not, Mrs. Cohen, that as you walked across the lobby that morning, you noticed nothing unusual about the rugs or anything else? A. That's true.

Mr. Sedgwick: I think that is all, your Honor. Oh, one more question.

Q. You will recall at the time of the taking of your deposition you were shown a photograph of the lobby of the hotel? A. Yes.

Q. You recall that? A. Yes, sir.

Q. And you were asked to mark that photograph with an X in the position that you fell? Do you remember that?

A. I did the best I could, because I didn't know when that photograph was taken and so on, but I don't see my initials here, sir. I don't know this is the one that I did or had my initials here. I think I noticed the one I marked.

Q. Isn't it your testimony you do not recall marking that photograph?

(Testimony of Lucy K. Cohen.)

A. I did mark a photograph at the time the deposition was taken, but I don't know whether this is the same one, because it is not initialed. [217]

Q. Well, does it show the place that you fell?

A. No, it shows the direction in which I was walking, sir. It doesn't show where I fell.

Mr. Sedgwick: Referring again to the deposition, if your Honor please, commencing on page 20, line 20, continuing to page 21, line 19.

Mr. Melchior: I will be happy to stipulate those questions were asked and answered, and they were not corrected.

Mr. Sedgwick: Thank you.

"Mr. Channing: I would like to have this photograph marked as Defendant's Exhibit No. 1 for identification for the purpose of the plaintiff's deposition.

(Black and white photograph was marked

Defendant's Exhibit No. 1 for identification.)

"Mr. Channing: Q. Mrs. Cohen, I want to show you this photograph which has been marked and ask you if you can tell me what that is.

"A. Well, from my one night stay at the Hotel Maurice I would say it was a part of the lobby.

"Q. Does that photograph show where you fell?

"A. No. There are no 'X' marks the spot so far as I can see.

"Q. That is what I mean. Is there a place in that photograph that you can place an X and show us where you fell? [218]

(Testimony of Lucy K. Cohen.)

"A. Yes, it is right about here, somewhere around here.

"Q. I wonder if you would mark it with this fountain pen?

"A. Yes, somewhere in here. This is the side of the door that was open.

"Q. With the same fountain pen will you show me in which direction you were going by making an arrow? "A. Yes."

Mr. Melchior: Do you have the photograph, counsel?

Mr. Sedgwick: I am going to offer it in evidence at this very moment and ask the Court's permission if I may remove the photograph which is marked Defendant's Exhibit 1 for identification and attached to the original deposition of Lucy K. Cohen.

The Court: Any objection?

Mr. Melchior: May I take a look at it, if your Honor please?

The Court: Certainly.

Mr. Melchior: No, I have no objection.

The Court: Received in evidence.

The Clerk: Defendant's Exhibit B in evidence.

(Whereupon the photograph above referred to was marked Defendant's Exhibit B in evidence.) [219]

Mr. Sedgwick: May I at this time show it to the jury, your Honor?

(Handing exhibit to the jurors.)

Mr. Sedgwick: I have no further questions, your Honor.

(Testimony of Lucy K. Cohen.)

Redirect Examination

Q. (By Mr. Melchior): How large is your home, Mrs. Cohen?

A. It is a 6-room brick house with a basement as well.

Q. Is that therapy about which you have testified prescribed by a physician? A. Yes, sir.

Q. All of it? A. All of it.

Q. And on the picture which is now in the hands of the jury, there is a circle. Do you know how that circle came to be in the picture? Is that the X that you made?

A. I don't recall that is the X, that is the place where the rug was ruffled, the arrow was the direction in which I was going, there is no mark there on the door jamb where I fell, whether that was marked on it, on the photograph I was shown, I don't know.

Q. The arrow is where you started—the direction you were going? [220]

A. The direction which I was going.

Q. And the circle is where you started to fall?

A. No, where I must have caught my foot, at the edge of the rug.

Mr. Melchior: That's all.

Mr. Sedgwick: I have nothing further, your Honor.

Mr. Melchior: Step down, please, Mrs. Cohen.

(Witness excused.)

Mr. Melchior: I would like to ask the Court at this time to take judicial notice of the United States Life Expectancy Table of the United States Census, 1949-1951 for white female persons aged 51, which is the age of the plaintiff, Mrs. Cohen; Mr. Sedgwick and I have stipulated this is the correct table and her life expectancy, according to this table, is 25.91 years.

The Court: Stipulated to that?

Mr. Sedgwick: I have no information about it at all. If counsel says this is what the table says, I certainly am not going to question it.

The Court: What document did you get this out of?

Mr. Melchior: This is a compilation of life expectancy tables, your Honor, and the particular table from which I am reading is—

The Court: Who makes the compilation? [221]

Mr. Melchior: The compilation is made by Nelson & Ward, Consulting Actuaries, a compilation of all published tables. There are about 22 tables in the book.

The Court: I don't know anything about that book, usually the table we receive in evidence here, the table for which counsel is requested to stipulate is found in the statute books.

Mr. Sedgwick: That's right. It's in the corpus juris.

Mr. Melchior: Corpus juris?

The Court: I don't know anything about the corpus juris. This is usually in the statutes, that is, it is published there. You know, the legislature

doesn't adopt anything, it is one of the things published in the statute book and given authenticity to that extent. This is a private compilation.

Mr. Sedgwick: That is right.

Mr. Melchior: I showed it to counsel some days ago, and counsel agreed that this table—

Mr. Sedgwick: If that is the same, if that's that table, I have no objection to it.

Mr. Melchior: This is the same table.

The Court: Instead of offering the table, why don't you—Mrs. Cohen is what, 51 years old?

Mr. Melchior: That is correct. [222]

The Court: All right. Now what is the life expectancy in accordance with that table for one 51 years old?

Mr. Melchior: 25.91 years.

The Court: May we have a stipulation to that?

Mr. Sedgwick: Yes, sir.

The Court: All right.

Mr. Melchior: Thank you very much.

I am sorry, your Honor, I did not understand perfectly the ruling of the Court this morning with respect to the computation of damages. Did your Honor rule that I could submit a schedule or that I could argue from the schedule?

The Court: We don't let you send any schedules in with the jury, but what you can do, if you are worried about the jury not being able to remember what you tell them, why we will give the jurors a piece of paper and pencil, each one of them, and they can make some notes.

Mr. Melchior: I would appreciate it.

The Court: I don't allow this blackboard business, any schedules to be sent in to the jury. They can't remember what you put on the blackboard and they can't remember what you tell them, either, in your closing argument, but I allow the jury to have a piece of—a pad of paper and a pencil and they can make whatever notes they want to during both your arguments.

Mr. Melchior: That is agreeable to me, your Honor. [223] Plaintiff rests at this time.

The Court: The plaintiff rests. All right.

Mr. Sedgwick: Call Mr. Walsh, please.

JOHN RAYMOND WALSH

called as a witness on behalf of the defendant, sworn.

The Clerk: Please state your name, your address, your office address, your occupation to the Court and to the jury.

The Witness: John Raymond Walsh, 7870 Sterling Drive, Oakland, California.

Direct Examination

Q. (By Mr. Sedgwick): Your occupation?

A. Legal photographer.

Q. Mr. Walsh, you are employed as a photographer by the Bay Cities Legal Service?

A. I am one of the owners of Bay Cities Legal Service.

Q. I beg your pardon, sir. In pursuit of that occupation, at the request of the defendants here,

(Testimony of John Raymond Walsh.)

did you take some photographs of the lobby of the Maurice Hotel in San Francisco? A. I did.

Q. Can you tell us what date they were taken?

A. I believe it was December 16, 1957.

The Court: What was the date of the accident?

Mr. Sedgwick: August 14, 1957, your Honor.

Q. I show you first a photograph and ask [224] you if that is a fair representation of the condition of the portion of the lobby of the Maurice Hotel?

A. That is.

Q. Can you tell us in what direction that photograph was taken?

A. This was taken from in front of the elevators looking north towards the doorway leading to Post Street.

Mr. Sedgwick: May I offer this photograph as Defendant's Exhibit next in order, if your Honor please.

The Court: Received in evidence.

The Clerk: Defendant's Exhibit C in evidence.

(Whereupon the photograph above described was received in evidence as Defendant's Exhibit C.)

Q. (By Mr. Sedgwick): I show you another photograph and ask you to tell us what portion of the lobby of the Maurice Hotel that shows, if any?

A. This is a detail of the area between the two rugs. This is still looking north, taken from in front of the elevator moving more towards the front door.

(Testimony of John Raymond Walsh.)

Mr. Sedgwick: I will offer this as Defendant's Exhibit next in order, your Honor.

Mr. Melchior: No objection.

The Court: Received in evidence.

The Clerk: Defendant's Exhibit D in evidence.

(Whereupon the photograph above referred to was received in evidence as Defendant's Exhibit D.) [225]

Q. (By Mr. Sedgwick): I show you another photograph and ask you to tell us what that shows.

A. This shows the lobby of the Maurice Hotel looking east from the west side of the lobby, which would be towards the desk side, showing the front door and the space between the pillars.

Mr. Sedgwick: Offer it as Defendant's Exhibit next in order.

Mr. Melchior: No objection.

The Court: Received in evidence.

The Clerk: Defendant's Exhibit E in evidence.

(Whereupon the photograph above referred to was received in evidence as Defendant's Exhibit E.)

Q. (By Mr. Sedgwick): Mr. Walsh, when you took those photographs—first, did you make any changes in the rugs yourself?

A. No, sir, I did not.

Q. Did anyone else make any changes to the rugs so far as you know?

A. Not to my knowledge, no.

Q. Did you go in, set up your camera, and take

(Testimony of John Raymond Walsh.)

your photographs of the conditions as it then existed without change, so far as you know? [226]

A. That is correct.

Mr. Sedgwick: I have nothing further, your Honor.

The Court: Cross-examination?

Mr. Sedgwick: While he is doing that, may I show the photographs to the jury?

The Court: Surely.

Cross-Examination

Q. (By Mr. Melchior): Mr. Walsh, I think you took those pictures on December 16, 1957, you said?

A. That is correct.

Q. Have you any knowledge as to the condition of the things shown in those photographs on August 14, 1957? A. No, sir, I have not.

Q. You don't know anything at all about how it looked that morning, do you?

A. No, sir.

Q. Now, did anyone have any discussion with you at all about the kind of photographs you were supposed to take?

A. They told me somebody had fallen in a certain area and they wanted photographs to show that.

Q. Who is "they"?

A. The manager of the hotel, I believe. I forgot his name. I didn't mark it down.

(Testimony of John Raymond Walsh.)

Q. Did he tell you what kind of pictures he wanted? [227]

A. No. I have been building up a reputation as a legal photographer over a period of approximately 15 years and people rely on my knowledge and ability to take a photograph that will stand up in Court and show what they want to show.

Q. Show what?

A. Show what they want to show, the area in question as it is.

Q. Did anyone meet you while you were in the lobby and have a discussion with you about the kind of photographs that were to be taken?

A. There was a Mr. Goldman, I believe, there.

Q. Who?

A. He was a representative of Mr. — Keith, Creede & Sedgwick's office.

Q. Did he tell you what photographs were wanted?

A. He said he wanted a view looking this way, a view looking that way and a detail.

Q. Did he assist you in setting up your camera for angles and anything of the kind?

A. No, he didn't. He was talking to the manager at the time I was doing my photographic work.

Mr. Melchior: That's all.

Mr. Sedgwick: Thank you, Mr. Walsh.

(Witness excused.)

Mr. Sedgwick: Mr. Carter. [228]

RICHARD S. CARTER

called as a witness on behalf of the defendants, sworn.

The Clerk: Please state your name, your address, your office address will do, and your occupation to the Court and to the Jury.

The Witness: Richard S. Carter, 872 Sutter Street. I am a bellman at the Maurice Hotel.

· Direct Examination

Q. (By Mr. Sedgwick): Mr. Carter, what is your present occupation, sir?

A. I am a bellman at the Maurice Hotel.

Q. For how long have you been a bellman at the Maurice Hotel? A. About 7 years.

Q. Were you on duty on the morning that Mrs. Cohen fell in the lobby? A. Yes, sir.

Q. That we have been talking about here for several days? Can you tell us about where you were at the time she fell?

A. Well, I was outside the hotel.

Q. And what were you doing outside, sir?

A. I had just put some bags into a taxi.

Q. Do you know whose bags those were?

A. I don't remember.

Q. Did you come back into the hotel? [229]

A. Yes, sir.

Q. What did you notice, if anything, as you entered the hotel?

A. As I came back in through the door, I noticed Mrs. Cohen on her knees on the carpet.

(Testimony of Richard S. Carter.)

Q. About how close to the front door would you say she was? A. Well—

Q. Just your best estimate?

A. I would say from a foot and a half to three feet from the door.

Q. Did you do anything at that time, did you go up to her? A. Yes.

Q. You recall anything that was said?

A. Well, I tried to pick her up, "You want me to help you up?" She said, "No, let me alone," as I remember it.

Q. All right. Did you later help her up?

A. Yes, sir.

Q. Where did you help her to?

A. Around to a settee in front of the desk.

Q. Did you notice Mrs. Cohen's daughter there at the time?

A. No, I didn't. She may have been there, but I didn't notice her.

Q. Now, let me ask you this question, Mr. Carter: Did you [230] at any time that morning say to Miss Cohen, Mrs. Cohen's daughter, the young lady whose first name is Gene, Miss Gene Cohen, did you at any time say to her in anybody's presence or alone, anything substantially to the effect that, "I make a point of watching this rug"?

A. No.

Mr. Melchior: I object. I think counsel asked a compound question, did he at any time that morning or did he at any time say anything to Miss Gene Cohen.

(Testimony of Richard S. Carter.)

The Court: The objection is overruled. Read the question to the witness.

(Record read.)

The Witness: No, sir.

Q. (By Mr. Sedgwick): Confining your attention to this morning of the accident, and so we will not misunderstand each other, not referring to the next day when the people came back and took photographs, but confining ourselves now to the morning of the accident, was there any discussion by you with Mrs. Cohen or Miss Cohen or anyone else there regarding the rug?

A. None whatsoever.

Q. Now, did you take Mrs. Cohen upstairs?

A. Yes, sir.

Q. How did that come about?

A. Well, she sat on the settee for a little while to recover her equilibrium, and I believe Mr. Hoffer, the manager, [231] suggested that we take her upstairs, back in the room from which she checked out of. I helped her into the elevator and when we got up there I carried her to the room.

Q. Did you do this against her will at all?

A. No. In the elevator she said, "Let me alone, I can stand all right." I said, "I better hold you," I had her in my arms, "I better hold you until you get to the room."

She didn't object after that.

Q. Now, do you remember the following day, Mr. Carter, that this same Miss Gene Cohen came back to the hotel accompanied by Mr. Melchior

(Testimony of Richard S. Carter.)

here, the attorney, and a photographer? Do you remember that?

A. I don't remember Miss Cohen or this gentleman here, but I remember that a photographer and somebody with him took some pictures, but I wouldn't know it was the next day or when it was.

Q. Was it shortly after this accident?

A. It must have been.

Q. Within a matter of days?

A. I would judge so. My memory is very faulty about that. We were very busy; it was in August and any small event like somebody taking pictures, which they sometimes did in the lobby, wouldn't have attracted much attention on my part.

Q. You recall somebody came in?

A. Yes, sir. [232]

Q. Accompanied by some other people and took some photographs? A. I do.

Q. At that time did you have any conversation with these people that were there to take these photographs?

A. Somebody engaged me in conversation.

Q. Now, during that conversation did you make any statement to the effect, or substantially to the effect that "I make a point of watching this rug"?

A. No, sir.

Q. Did you make a statement to the effect or substantially to the effect that this happens all the time? A. Oh, no.

Q. Did you make a statement substantially to the effect that this is a dangerous condition?

(Testimony of Richard S. Carter.)

A. No, sir.

Q. Did you make a statement that this happens regularly?

A. No, I wouldn't have made a statement like that.

Q. You say you wouldn't have made any statement like that? A. I would not have, no.

Q. Can you tell the Court and jury why you wouldn't have made any such statement?

A. Well, because it wouldn't be true. I wouldn't have any purpose of telling an untruth about that.

Q. You have been there, you said, seven years?

A. Sir? [233]

Q. You have been there seven years?

A. Approximately, I believe a little better than that.

Q. Have you ever seen anyone or known of anyone falling in the lobby before? A. No.

Q. I will show two photographs—three photographs, Plaintiff's 1, 2 and 4. These are photographs looking towards the doorway showing the rug in question. Would you look at those, please? Just look at them, sir. A. Yes, sir.

Q. Have you ever seen the rugs, the rug we are talking about here in this case, the one closest to the door, have you ever seen it in that condition at any time?

A. I have never seen it ruffled up like it is there.

Q. Occasionally during the years that you have

(Testimony of Richard S. Carter.)

been there does the rug become mussed somewhat?

- A. Once in a while.
Q. Do you do anything about it if you notice it?
A. Whenever I notice it I smooth it down.
Q. About how many times would you say during that—

A. Well, very, very seldom. I haven't—I don't think I have smoothed it down at the present time for a couple of years. [234]

Q. Were you in the habit of keeping your eye on that rug? A. No reason for it.

Q. Did you pay any particular attention to that rug?

A. No, not either one of the rugs. There are two in the lobby, as you know.

Q. The two are about the same, are they not?
A. Yes, sir.

Q. What time did this accident occur to Mrs. Cohen in the morning of August 14?

A. Well, it was about 7:30 or 7:40, as I remember.

Q. Between 7:30 and 7:40?
A. Somewheres around there.

Mr. Sedgwick: I think that is all, your Honor.

Cross-Examination

Q. (By Mr. Melchior): When did you first see Mrs. Cohen on that morning, Mr. Carter?

A. The first time I noticed her to remember was when I picked her up. Undoubtedly I must have seen her before that, but I don't remember.

(Testimony of Richard S. Carter.)

Q. There isn't any question in your mind, is there, that she was injured that morning in the lobby there?

A. That was the time of the accident in the morning.

Q. There is no question about it at all that that was [235] how she was injured in the lobby by falling?

A. I don't know as I understand your question.

Q. Was she injured by falling in the lobby, or had her condition existed prior to that?

A. Oh, no. I understand. She evidently fell in the lobby because I picked her up from it.

Q. Actually your memory about what else happened in August of last year—I guess it is two years now—August, 1957, isn't very good, is that right.

A. That is correct. I remember the accident because it was something outstanding and unusual, but a routine affair I wouldn't remember very much about it.

Q. Such as the event of having the pictures taken you say you don't remember very much about it? A. Very little.

Q. Do you recall exactly what it was that you said in conversation at the time the pictures were taken?

A. Not precisely. That was nine months ago, I believe.

Q. Actually until you prepared yourself to tes-

(Testimony of Richard S. Carter.)

tify for this trial you couldn't remember that the pictures were taken at all, could you?

A. I remember two different photographers at two different times taking pictures, but what took place or what was said I don't remember.

Q. You got those two different events of taking the [236] pictures clearly separated in your mind, have you, so that you remember which was one and which was the other?

A. No, I wouldn't say that I had. I remember that someone from each party engaged me in conversation, but what was said each time I couldn't tell you.

Q. Now, do you recall ever saying in the presence of Miss Gene Cohen and Mr. Lohman and myself that whenever you saw the carpet up you smoothed it down?

A. No, I don't recall saying that now. I might have recalled at the time of the deposition, but at the present time I can't recall that, sir.

Q. Do you recall saying you smoothed the carpet down only when somebody's heel catches on it?

A. I didn't.

Q. You recall testifying in a deposition?

A. I do.

Q. In my office? A. Yes, sir.

Q. And that was on March 25, 1958.

A. I wouldn't remember the exact date.

Q. Do you recall saying at that time that you smoothed the rug down only when someone's heel catches on it?

(Testimony of Richard S. Carter.)

Mr. Sedgwick: Excuse me, I am going to object to the form of the question. I don't believe that is the proper way to approach the deposition, we have a page and a number. [237]

The Court: Yes.

Mr. Sedgwick: And get the exact words.

Mr. Melchior: Page 8, line 24.

"Q. Do you recall saying"—

Mr. Sedgwick: Excuse me.

Mr. Melchior: Let's start at page 8, line 16.

Mr. Sedgwick: How far do you propose to read?

Mr. Melchior: I propose to read to page 9, line 10.

Mr. Sedgwick: I have no objection, your Honor, I will stipulate that the questions were asked and the answers given as shown.

Mr. Melchior: Page 8, line 16.

"Q. What do you remember?

"A. I remember saying to someone and no doubt it was you if you remember me and remember the occurrence, that whenever I saw the occurrence, that whenever I saw the carpet up I smoothed it down, but I didn't, distinctly don't remember saying regularly, because I don't know why I would be because it doesn't regularly go up.

"Q. Pretty regularly, my notes have.

"A. Well, I can't remember saying that, no.

"Q. Do you recall saying that you do this only when someone's heel catches on it? [238]

"A. I don't recall saying that, but quite likely could have.

"Q. That is true as a matter of fact, is it?

(Testimony of Richard S. Carter.)

"A. Well, I would say that if the heel caught on it, a man's heel caught on it, I have never seen a woman's heel catch on it, but if a man pulled it up I would smooth it down.

"Q. How many times have you seen that, that people's heels catch on it?

"A. I couldn't tell you; very seldom, very seldom.

"Q. You have seen it before?

"A. I have seen a man catch his heel on there, but actually the number of times I couldn't tell you. It would be very few."

You recall that testimony, Mr. Carter?

A. Yes, sir.

Q. Now, it is true, isn't it, that ever since you have been at the Maurice Hotel that carpet will curl up once in a while, isn't that correct?

A. I have seen it curl up a few times. I wouldn't exactly call it curl up.

Q. You describe it for us.

A. Slightly—not like the pictures that I have looked at. I have seen it risen, or, perhaps a half inch up. [239]

Q. I would like to show you Plaintiff's Exhibit 1 and ask you to look at the back of it, please, turn it over and look at the back of it, please. Will you read what it says on the back?

A. Photographed April 15, 1957, Kleins Legal Service, San Francisco, California.

Q. And in pencil on the top corner?

A. I can't make that out. It says the date is

(Testimony of Richard S. Carter.)

3-25-58 and Lucy Cohen deposition. Above that is something which I can't decipher.

Mr. Melchior: Perhaps counsel will stipulate it is Plaintiff's Exhibit 1 for identification.

Mr. Sedgwick: Yes.

Mr. Melchior: Thank you.

Q. Now, Mr. Carter, do you recall being shown this photograph at the time of your deposition?

A. Yes, sir.

Mr. Sedgwick: May I see that photograph again? Is this the one that is in evidence?

Mr. Melchior: Plaintiff's Exhibit 1 in evidence.

Mr. Sedgwick: Already in evidence?

Mr. Melchior: Yes.

Mr. Sedgwick: Oh.

Q. (By Mr. Melchior): Didn't you testify—I am sorry. Do you recall that the carpet looked like that now and then? [240]

A. I never saw—I have never seen two ruffles in it like that.

Q. But you have seen ruffles of that size, have you?

A. I don't know whether they were that size, it is pretty hard to say how big they are in the picture.

Mr. Melchior: Counsel, I would like to read from page 10, line 18 of Mr. Carter's deposition, to page 11, line 17.

Mr. Sedgwick: Stipulated that the questions were asked and the answers given as recorded, your Honor.

(Testimony of Richard S. Carter.)

The Court: All right.

Mr. Melchior: Mr. Carter, do you recall these questions and answers.

"Mr. Melchior: Will you mark these for identification, Plaintiff's Exhibits 1, 2 and 3.

(Thereupon the photographs above referred to were marked Plaintiff's Exhibits 1, 2 and 3 for identification.)

"And I have interpolated now and I have given you Plaintiff's Exhibit 1 of those that were marked, you hold it in your hand.

"Mr. Melchior: Q. Let me show you what has been marked Plaintiff's Exhibit 1 for identification and ask you what that is, whether you recognize it?

"A. Yes, that's the lobby of the hotel.

"Q. Is that a fair representation of what the lobby [241] of the hotel looks like.

"Mr. Levy: Now, wait a minute.

"A. No, no, customarily the carpet isn't up.

"Q. Have you ever seen it up like that?

"A. Similar to it.

"Q. How often?

"A. Oh, very, very seldom.

"Q. How many times would you say in the course of six years?

"A. I wouldn't honestly be able to give you a correct answer.

"Q. But you have seen it that way now and then?

"A. I have seen it now and then like this.

(Testimony of Richard S. Carter.)

"Q. In just the condition it is in that picture?

"A. Well, approximately. I don't remember seeing two loops up there, I don't remember offhand of seeing that, but usually whenever you did anything to it it would be one and I would walk and smooth it down with my foot."

A. That sounds correct to me, as I remember it.

Q. Now, what did you do to smooth down the carpet?

A. Just smoothed it down with my foot.

Q. Would you put it under the potted plants that were standing in front of the pillars?

A. No, sir. [242]

Q. Did you ever tell anybody that this happens to the carpet now and then?

A. I probably told you; I believe you asked me.

Mr. Sedgwick: I am sorry, your Honor, could I hear the answer?

(Record read by the Reporter.)

Q. (By Mr. Melchior): Did you ever tell the manager about this condition? A. No.

Q. Of the condition of the carpet? No, you never did. And you worked there how many years?

A. Seven years.

Mr. Melchior: That's all.

The Court: Any further questions?

Mr. Sedgwick: Yes, your Honor.

(Testimony of Richard S. Carter.)

Redirect Examination

Q. (By Mr. Sedgwick): Counsel has read, if your Honor please, from the deposition on page 8, line 17 to page 9, line 10 and on the same subject I would like to read the next four lines. The last question read to the witness was:

“Q. You have seen it before?

“A. I have seen a man catch his heel on there but actually the number of times I couldn’t tell you. It would be very few. [243]

“Q. Before the time of this accident had you seen it happen?

“A. Only before and a long time, two or three years ago.

“Q. Did you say anything about that to anybody when you saw people’s heels catch on it?

“A. No, because it was so unimportant.

“Q. Nobody ever fell, did they, as a result of catching their heels until this happened?

“A. No, no. Sometimes when there was a rain or something it would curl up a little, why, a time or two I have seen a man walk across it, but I have never seen a woman catch her high heel on it at all.”

Mr. Sedgwick: Thank you. Nothing further. You may step down.

The Court: Do you have anything further?

Mr. Melchior: Nothing further, your Honor.

The Court: Step down.

(Witness excused.)

Mr. Sedgwick: Call Mr. Schroeder.

The Court: This will be a good time to take a recess.

While you are out of the courtroom don't talk about the case, ladies and gentlemen of the jury.

(Short recess.) [244]

Mr. Sedgwick: Mr. Schroeder, please.

DOUG E. SCHROEDER

called on behalf of the Defendants, being first duly sworn, testified as follows:

The Clerk: Please state your name, your occupation and your address to the Court and to the jury.

The Witness: Doug E. Schroeder, 1535 Green, Night Clerk at the Maurice Hotel.

Direct Examination

Q. (By Mr. Sedgwick): Mr. Schroeder, how long have you been employed at the Maurice Hotel?

A. Eleven years, going on 12.

Q. During all of that period of time have you been what we call a Desk Clerk there?

A. Correct.

Q. Do you recall, Mr. Schroeder, the morning of August 14, 1957, the day that Mrs. Cohen fell in the lobby of the hotel; you remember that morning?

A. I remember part of it, yes, sir.

Q. Were you on duty there at the time?

A. I was, yes.

Q. What time did you go off duty that morning?

A. 8:00 o'clock. [245]

Q. Can you tell us about what time this accident

(Testimony of Doug E. Schroeder.)

occurred? A. About 20 minutes to 8:00.

Q. Do you have any particular thing that you associate with that to fix that time?

A. Yes, after the accident I noticed that it was that time because Mr. Hoffer came in, our manager; he usually doesn't come in that early.

Q. This was something unusual?

A. That is right, yes, sir.

Q. What time did you go to work on that shift?

A. I usually go to work early, do my work, and so therefore I would say around 11:00 or 11:15.

Q. Do you recall Mrs. Cohen discussing with you how she was going to leave and what time she was going to leave? A. I do.

Q. Would you just tell us what you recall of that, Mr. Schroeder?

A. I do not recall whether it was in the night or whether it was in the morning when she came and her daughter came down, but they were discussing about going to the airport and how long it would take and what the price would be.

Mr. Melchior: Just a moment. I would like to have the foundation laid, counsel, please.

Q. (By Mr. Sedgwick): Where was this conversation, Mr. Schroeder? [246]

A. It was in the lobby, I was in back of the desk and Miss Cohen was on the opposite side of the desk.

Q. Was Mrs. Cohen there?

A. Mrs. Cohen is the one I talked to.

(Testimony of Doug E. Schroeder.)

Q. How about Miss Cohen, you recall whether she was with her or not?

A. I don't recall. I believe Miss Cohen was not there.

Q. I believe you also told us that you do not now recall whether it was in the evening when you first went to work or whether it was in the morning? A. That is right.

Q. All right. Will you just tell us what was said?

A. Then I told her how to get, to get out to the airport and what the rate would be if she took a cab out to the airport, also what the rate would be from the terminal, and she was undecided at that particular time just which way to go, whether to take a cab to the terminal or to take it over to the airport itself.

Q. Was there any discussion as to the time involved?

A. Not at that time, no. I told her it would take at least around 45 to 50 minutes to go out to the airport. That is what the limousine took going in going out and the cab would take her about a half an hour.

Q. Now, was there any discussion that you recall, any confusion about the time? [247]

A. Not at that time when we were talking, but it seems as through later she found out that there was an hour difference in the time.

Q. All right. Did you actually see this, see Mrs. Cohen fall? A. No, sir, I did not.

(Testimony of Doug E. Schroeder.)

Q. Did you see her leave from near your desk or from in front of the elevator to a point where she did fall?

A. I don't know exactly what I was doing, but as I looked up from the desk I saw Miss Cohen in a half run, a half walk going towards the door to catch her cab.

Q. Was it immediately thereafter that fall?

A. It was the time—I had turned after I had seen her go by, I turned my head to do something else, I paid no more attention to it because I knew she was going to catch her cab, and as I looked up again that is when I saw where the accident was.

Q. I want to show you three photographs which are marked as Plaintiff's Exhibits 1, 2 and 4 in evidence, ask you to look at them, if you would, please. A. Yes, sir.

Q. Now, these photographs, all three of them, show the rug that goes across the lobby in front of the entrance door, do they not? [248]

A. Yes, sir.

Q. Have you, during the eleven years that you have been there ever seen the edge of that rug in the condition as shown in these photographs?

A. None that I can recall, sir.

Q. Have you ever seen it raised anything like the condition as shown in these photographs?

A. No.

Q. I'll show you Defendants' Exhibits C, D and E, ask you if that is a fair representation of the

(Testimony of Doug E. Schroeder.)

condition of the lobby rug which lies in front of the entrance doorway?

A. To my knowledge that is the way the rug is always laying. I always walk past it and I have never paid much attention to the rug, but according to my recollection that is the way it lays.

Q. Have you ever seen it any other way?

A. No, sir, I have not.

Mr. Sedgwick: I think that is all, your Honor.

Cross-Examination

Q. (By Mr. Melchior): Mr. Schroeder, where is your post of duty in the lobby of the Maurice Hotel?

Mr. Sedgwick: The what?

Mr. Melchior: The post of duty.

A. Just what do you mean, sir? [249]

Mr. Melchior: Where are you stationed while you are working?

A. I am back of the desk.

Q. I see. Now, where is the desk located in the lobby there; just tell the jury where the desk is located.

A. Well, I have to stop and think. I really can't place it right off quick at hand. Coming in it would be on the right-hand side; going out it is on the left-hand side going out of the door.

Q. Is it at the same floor level as the lobby, Mr. Schroeder? A. Yes.

Q. Do you stand on the floor behind the desk customarily?

(Testimony of Doug E. Schroeder.)

A. That is correct, when working.

Q. That is where you spend all of your time while on duty?

A. That is until I am all through with my work, which is around 3:00 or 4:00 o'clock in the morning and then I sit out on the davenport and read the paper.

Q. Can you show me in one of these exhibits I am going to hand you, Defendant's Exhibit B and C and Plaintiff's Exhibit 1, can you show me in any one of those where you sit when you are not behind the desk?

A. Well, in fact, I don't see the couch. Let's see. I don't see the couch; the couch faces the desk. That's where I sit, so I can hear my telephone and also be right near the desk there. [250]

Q. In other words—

A. Don't go into the office.

Q. You have your face to the desk at that time?

A. That is correct.

Q. Is that right? A. That is correct.

Q. Do you have your face away from the edge of the rug which is marked with a circle here, Defendants' Exhibit B?

A. Yes; my back would be to the back there—it is going out, yes.

Q. Your back would be towards the entrance—

A. No, my back would be going out the door, the door would be here and the aisle goes here, and it is this way (indicating).

Q. When you are behind the desk is there any-

(Testimony of Doug E. Schroeder.)

thing between you and this space between the pillars that is marked with a circle here?

A. There is a post over on the side, yes; there is one of these posts that is on the side which blocks off part of the view, but which you can see the door—part of the door, going out.

Q. And there are potted plants, too, aren't there?

A. That is correct.

Q. There is a long settee set across that place, isn't that right? A. That is right.

Q. You can see that in the picture you have in your hand, isn't that correct? [251]

A. Well, I see the side of it here. Over here on the side, yes.

Q. As a matter of fact, these objects, the pillars and the potted plants and the davenport pretty effectively block your ordinary view of the edge of the carpet, don't they, where the desk is located?

A. Normally I would say yes, that is right up to the desk. Of course, we can see beyond the other carpet, beyond the—when walking. [252]

Q. But this particular place circled on the photograph you can't see?

A. That's right, yes.

Q. Now, as I recall your direct testimony, you said it seems that later it developed there was one hour difference in time.

A. That is right. We were on Daylight Saving Time.

Q. Was anything said about that?

(Testimony of Doug E. Schroeder.)

A. Not at that time that I can recall, because all planes, all trains and everything else are all run on the Daylight Saving Time.

Q. As a matter of fact, Mrs. Cohen had a conversation with you in the evening when she returned to retire for the night, didn't she?

A. As I said, I didn't quite recall whether it was then or whether it was in the morning, was when we had the conversation. I know it was a few minutes—we had talked ten or fifteen minutes.

Q. You talked for ten or fifteen minutes?

A. I would say that we had talked about the time going to the airport, and so on; maybe a little less, maybe no more than ten or fifteen minutes.

Q. For ten or fifteen minutes. You didn't notice any sense of urgency in that conversation?

A. No, there was not. [253]

Q. Now, what is a half run, half walk?

A. Well, I really don't know just how you might want to class it. You're not walking and still you're not running normally. It's a, I would say, a half gait. I don't know just how to explain it to you, but you wouldn't be walking and still you wouldn't be running at a full gait. It is a rather rushy move.

Mr. Melchior: I think that is all. Thank you.

Mr. Sedgwick: I have no further questions. Thank you, Mr. Schroeder.

(Witness excused.)

Mr. Sedgwick: Call Mr. Hoffer, please.

ALEX F. HOFFER

called as a witness by the defendant, being first duly sworn, testified as follows: [254]

* * * * *

Direct Examination * * * * *

Q. (By Mr. Sedgwick): You are at present manager of the Maurice Hotel?

A. That is correct.

Q. That hotel is located where, sir?

A. 761 Post Street.

Q. How long have you been the manager of the Maurice Hotel? A. Fifteen years.

Q. Have you served continuously during that period? A. Continuously.

Q. Can you tell us who is the owner of the Maurice Hotel? A. E. B. DeGolia.

Q. Can you tell us whether Mr. DeGolia owns this hotel as an individual or as an association, a partnership, a corporation, or what?

A. The Maurice Hotel is the personal property of Mr. and Mrs. DeGolia, community property.

Q. Where is Mr. DeGolia at the present time?

A. He is in Notre Dame Hospital; has been for some number of years.

Q. Is he able to come to court.

A. No, he is not; he is incapacitated.

Q. Now, one of the defendants is Western Hotels. Does the Western Hotels own or have any interest in the Maurice Hotel?

A. The Maurice is an affiliate of the Western

(Testimony of Alex F. Hoffer.)

Hotels, not owned or operated by the Western Hotels; it is owned by E. B. DeGolia.

Mr. Melchior: May I move that go out, your Honor? It was admitted in the answer that Western Hotels was and now is managing and operating said premises as agent of the defendant DeGolia; the defendant Western Hotels, a corporation, at all such times was and is maintaining the hotel under the name Hotel Maurice, and at all such times had and now has actual control of the premises. That was admitted in the answer. It's an allegation in Paragraph III of the complaint. I move the answer be stricken.

Mr. Sedgwick: Excuse me, your Honor. I am not certain that is true. May I check it?

The Court: Surely.

Mr. Melchior: To be technically correct, the allegation was not denied and, therefore, stands admitted.

Mr. Sedgwick: I will have to concede, your Honor, that counsel's statement is correct. We will then, of course, [256] have to move the Court for permission to amend the answer to conform to proof at the proper time.

The Court: Any objection?

Mr. Melchior: Well, I wasn't prepared to meet this issue, your Honor.

The Court: Well, the motion is granted. The evidence is in. This is the usual motion to amend the pleading to conform to proof.

Mr. Melchior: I have had no opportunity to

(Testimony of Alex F. Hoffer.)

investigate this or meet it, if there is any way of meeting it. It isn't very important, but—

The Court: No, I don't think it is important at all, one way or the other.

Mr. Melchior: Very well.

The Court: As far as it is admitted or isn't admitted. It is important to fix who owns the place, who owns the hotel, important to know whether the Western group has any interest in it or not and, it being important, I am going to allow counsel to amend his answer to conform to the testimony. Now, the man apparently has knowledge on that subject.

Mr. Sedgwick: Yes, your Honor.

The Court: All right.

Mr. Sedgwick: Thank you, your Honor.

Q. To continue, then, to recapitulate, perhaps, the Maurice Hotel is not operated by Western Hotels? [257] A. No, sir.

Q. The Maurice Hotel is not owned in any part by Western Hotels? A. No, sir.

Q. Would you tell the Court and jury just what this relationship or association between the Western Hotels and the Maurice Hotel is?

A. Well, Mr. DeGolia owns the Maurice Hotel. I worked for him 15 years and at one time we had nothing to do with the arrangement at all. He also owns properties which Western is interested, in, also, and through that there is an affiliation where we make reservations at other Western Hotels; they make them with us and through the teletype

(Testimony of Alex F. Hoffer.)

and credit cards, things of that kind, because of his ownership is some other interests.

Q. Now, Mr. Hoffer, you're familiar with the rug involved here. I am sure you know the one we are referring to. A. Yes, sir.

Q. I am referring to the long rug immediately in front of the entrance to the hotel shown in Defendant's Exhibit D there.

A. Yes, sir, I know the rug. I bought them.

Q. That was my next question. Did you purchase these rugs?

A. Yes, sir; I bought them myself.

Q. Are the two rugs there substantially the same?

A. Two rugs of the same size.

Q. What is the size, approximately? [258]

A. Roughly 11 x 31. That's from memory now. I wouldn't want to be quoted to the inches on that. That is at the time of purchase, that is what they were.

Q. Do they have some sort of a pad underneath them?

A. They have a pad underneath them.

Q. Where did you purchase the rugs?

A. Sloane's designed them for us. They are chenille made by Mohawk. Sloane designed them for us.

Q. When did you purchase them from Sloane's?

A. 1946.

Q. When you say "Sloane's," you mean W. and J. Sloane? A. That is correct.

(Testimony of Alex F. Hoffer.)

Q. You say "manufactured by Mohawk." Is that an American company?

A. Mohawk is an American carpet company, yes, sir.

Q. Are these rugs manufactured in America; in the U. S.?

A. Manufactured in America.

Q. They are not Chinese rugs?

A. No, sir. They are what they call a chenille or woll chenille.

Q. Now, do the pads come out, completely out to the edge or side edge of the rug?

A. No, the pad does not come out to the edge of the rug. If they did, it would be all wrong; you have to allow for the drop of your rug to come down, depending upon the thickness [259] of your rug. Why, you got to cut your pad further back so that you allow a contour to it, and depending upon the thickness of your padding—if you use a 40-ounce felt, rubber or other equipment, it has to have a certain spread.

Mr. Melchior: I move this answer be stricken on the ground your Honor has ruled for the purposes of this case that the jury themselves are to be the judges of how the rug should be properly laid and is not a matter of expert testimony. Moreover, this gentleman has not been shown to have any particular qualifications.

The Court: He isn't talking about any expert testimony; he is talking about whether there is a space between the edge of the rug and the mat.

(Testimony of Alex F. Hoffer.)

Mr. Melchior: That much I agree—

The Court: Why they left this space; nothing expert about that. The objection is overruled.

Q. (By Mr. Sedgwick): About how much—can I call it “overlap” or “overhang” is there? How far does the rug extend past the side of the mat, approximately?

A. Oh, our rugs, I imagine, at the present time have around a four-inch overlap.

Q. Mr. Hoffer, when was the first time, to your knowledge, that you ever saw Mrs. Lucy Cohen, or her daughter, Miss Gene Cohen?

A. On the morning that she had this accident. I came in [260] and she was sitting on the chair or settee there and Mr. Lohman remarked, “What’s this all about”? That is the first time I saw her.

Q. Were you in the hotel at the time the accident occurred? A. I was not.

Q. Had you been there that morning at all?

A. No, sir, I had not.

Q. Did you meet or talk to Mrs. Cohen on the evening before?

A. I do not recall having met her the night before.

Q. Do you recall her having given you a letter of—well, a letter of recommendation? I guess that isn’t quite right.

The Court: Confirmation of a reservation, wasn’t it?

Mr. Sedgwick: No, I understood that—

The Court: You tell us what it was.

(Testimony of Alex F. Hoffer.)

The Witness: Well, my recollection of it, of this incident, is that she wrote in one or two letters asking about accommodations and I confirmed accommodations to her, which is our custom on that, and I did not see her. That was all done—she lives in the East and then she came in one evening. I was not there, and that morning when she fell down, why, I came in about twenty minutes to eight and there she was. I did not see her that I know of.

Q. Do you know approximately how long before you reached the hotel the accident had occurred?

Mr. Melchior: I object to that. That would be hearsay. He wasn't there. [261]

The Court: I don't suppose when she reached the hotel is a matter of personal knowledge.

Mr. Melchior: When she reached the hotel to check in the first time?

The Court: Did you see her?

The Witness: No, I did not, so I did not know when she checked into the hotel.

Mr. Sedgwick: I am sorry, your Honor, I meant to ask him if he knew about what time the accident occurred.

Mr. Melchior: I object—

The Witness: Yes, I do.

Mr. Melchior: I object, your Honor. He wasn't there and he would know only what he heard through others.

(Testimony of Alex F. Hoffer.)

The Court: Well, were you in the lobby when this woman fell down?

The Witness: I was not.

The Court: All right, I guess he doesn't have any personal knowledge.

Mr. Sedgwick: What did you see when you first came in?

A. I came into the hotel and my auditor was there and talking to a lady that was sitting down and I said, "What's this all about?" He said, "Mr. Hoffer, I just got here. Doug Schroeder called me; this lady fell down." That's all I know about it. [262] I said, "Okay," and then I stepped in.

Q. Did you inquire as to whether a doctor had been called?

A. Yes, I talked to Mrs. Cohen then and asked her how she was, what I could do for her. She was sitting up, as I recall, at the time and, oh, she says, "Nothing at all; just let me be. I am all right. I don't want to be bothered." She didn't use the word "all right," but "Don't bother me." And then I stepped back to the desk to see who she was, what it was all about, and I talked to Mr. Schroeder and he told me who she was and I came back and I says to her, "Can't you get a doctor, get this straightened up?" She says, "No, my daughter is taking care of the doctor." I suggested she go back to her room and she didn't want to.

Q. Was anything said about the rug at that time? A. No, sir.

Q. At any time during any conversations you

(Testimony of Alex F. Hoffer.)

had with either Mrs. Cohen or her daughter, Miss Gene Cohen, was anything said about the rug?

A. Not at that time. I did talk to the daughter, not at that time; later on there was a conversation; not at that moment.

Q. Who was present at the later conversation that you are referring to?

A. Well, I believe her attorney commented about it and, as I recall, Mrs. Cohen called me on the phone and told me about it. [263]

Q. Were you present at any conversations where Mr. Carter was discussing the rug with Mrs. Cohen or Mr. Melchior? A. No, sir.

Q. Did you ever talk to Mrs. Cohen before this accident? A. I had not.

Q. Did you notice the type of shoes that she was wearing that morning?

A. Yes, she had a high-heeled shoe on, what we call French heels.

Q. Did you ever tell anyone or hear anybody in your employ state that this rug was a dangerous condition? A. I have not.

Q. Has anyone else ever fallen and presented a claim as the result of those rugs?

A. In the 15 years I have been there, 12 years the rugs have been laid, never any problem.

Q. What is the condition of the rug at the present time?

Mr. Melchior: I object——

The Witness: It is in good shape.

The Court: Well, the objection is overruled. It's

(Testimony of Alex F. Hoffer.)

in good shape—of course, the basis of your objection, Mr. Melchior, is that it is not material because it isn't at the time of the accident. Now, I would like the jury to understand the basis of my ruling. The basis of my ruling is that, if [264] that is the same rug and it is now in good shape, the fair inference can be drawn that at the time of the accident it was in good shape.

Q. (By Mr. Sedgwick): It is the same rug there now that was there at the time of the accident? A. Same rug is there.

Q. Has there been any repairs, anything done to it since the accident to the present day?

A. No.

Q. Nothing been changed? A. No, sir.

Q. I show you three photographs, which are Plaintiff's Exhibits 1, 3 and 4 in evidence, showing the rug we have been talking about, in particular the side away from the front entrance, ask you to look at those photographs. A. Yes, sir.

Q. Have you seen them, sir?

A. I see them.

Q. Have you ever seen that rug in the condition as shown in these photographs?

A. The only time I have ever seen the rug in that condition is the day that Miss Cohen and her attorney arranged it that way when they took pictures.

Q. I show you Defendant's Exhibits C, D and E, and ask you to look at them, if you will, please.

A. Yes, sir. [265]

(Testimony of Alex F. Hoffer.)

Q. Do Defendant's Exhibits C, D and E correctly and accurately show the condition of that rug?

A. That is the normal condition of the rugs.

Mr. Sedgwick: I think that is all. You may cross-examine.

Cross-Examination

Q. (By Mr. Melchior): Mr. Hoffer, just what is the relation between Mr. DeGolia and Western Hotels?

A. Mr. DeGolia owns the hotel.

Q. The Western Hotels?

A. Western Hotels does not own the hotel; it is an affiliate arrangement.

Q. I didn't quite understand your direct testimony—

The Court: May I interrupt for a moment? If you will excuse me, I have a phone call.

While you are out of the courtroom, ladies and gentlemen, don't talk about this case.

(Short recess.)

Mr. Melchior: May I proceed, your Honor?

The Court: Yes.

Q. (By Mr. Melchior): Mr. Hoffer, you have testified that the rug is now in good condition?

A. Yes, sir. [266]

Q. Just exactly what do you mean by that? Describe the way in which it lies on the floor.

A. It lies level on the floor, just like any ordinary rug does.

(Testimony of Alex F. Hoffer.)

Q. Have you ever tried to pick it up with your toe or with any implement at all at the edges?

A. No, I don't go around trying things like that. Pick it up with my toe? No, no reason to.

Q. Never made any experiments after this accident, have you?

A. Absolutely not. Put my toe deliberately under the rug and raise it?

Q. I am just asking you whether you made any effort to see whether it comes up easily or with difficulty.

A. I know many people have walked and have had no problems. I have made no specific effort to get down there and try to lift it up; no, sir, I haven't.

Q. I am not talking about getting down there. Have you ever made any effort any time—

A. Or standing up I have not.

Q. Have you ever noticed that the rug does not lie evenly in a straight line along the edge of the floor, but waves in and out? Have you ever noticed that?

A. I have not.

Q. Not to this day? A. No, sir. [267]

Q. At any time? A. No, sir.

Q. You have never seen it raised in any kind of a loop of any kind whatever at the edge, have you?

A. Now, when you say "loop," that's an awfully big word. Let's say I have seen times when it was a quarter of an inch high.

The Court: All right.

(Testimony of Alex F. Hoffer.)

Q. (By Mr. Melchior): When it's up—

A. Maybe a quarter of an inch, raised a trifle, a quarter of an inch or some fractional part of an inch, but to call it a "loop," that is a pretty hard thing to say.

Q. What is the highest you have even seen it?

A. Oh, I'd say perhaps at times it has been something—maybe a quarter of an inch or maybe at one time a little section—if you want to come down to perfection—

Q. What was the last part of your answer?

A. If you want to look for perfection down to perhaps a quarter of an inch in one little minute section over a period of the 12 years.

Q. Now, actually, after 12 years this rug is now showing some serious signs of wear, isn't it?

A. It is not. Now what I would call serious.

Q. I am going to show you Plaintiff's Exhibit 2 and ask you whether at the edge opposite the door—Excuse me, your Honor, [268] may I ask the question from here because—

The Court: Yes, go ahead.

Q. (By Mr. Melchior): I would ask you whether it is not true that at the place opposite the right door near the edge away from the door, within the second colored border, dark border, and then there is a light border—

A. Here?

Q. Opposite the right-hand door as you look at the picture, whether there isn't a place there where the nap is off the rug and you can see the nap?

(Testimony of Alex F. Hoffer.)

A. May possibly be where you can see, if you look deep between the piles, yes; that is true of any rug.

Q. I am asking you whether you can see it on that picture there.

A. I cannot see it, no. Can you?

Q. I certainly can, yes, sir.

Mr. Melchior: I am showing, for the record—I am describing—

The Court: What do you mean, are you going to locate something?

Mr. Melchior: I am going to locate something on the photograph; yes, your Honor.

The Court: The photograph will speak for itself.

Mr. Melchior: Very well.

The Court: If you want me to testify. [269]

Mr. Melchior: All right. May I pass the photograph to the jury?

The Court: Sure, you can pass the photograph to the jury and tell them what to look for.

Mr. Melchior: I ask the jurors to look at the place opposite the right-hand door at the edge of the rug, away from the door, inside the second colored border. I am going to point to it, if I may. Right there. (Passing photograph to the jury.)

The Court: I am not going to have you follow it all the way around the jurors with that. Go ahead with your examination.

Q. (By Mr. Melchior): Now, Mr. Hoffer, when you first came into the lobby, the accident had already happened that morning, hadn't it?

(Testimony of Alex F. Hoffer.)

A. That is correct.

Q. Did you make any effort to re-assure Mrs. Cohen?

A. Re-assure? In what way? I asked her how she was and what I could do for her.

Q. Did you offer to do anything for her?

A. Yes, sir. Can I get a doctor for her. Her daughter was getting a doctor for her.

Q. Didn't you tell Mrs. Cohen at that time that the hotel had no house doctor and that it would be better if she got her own doctor? [270]

A. I did not.

Q. May I finish my question, please?

A. You may.

Q. Didn't you tell Mrs. Cohen at the time she was sitting on the settee, right after the accident, that the hotel had no house doctor and it would be advisable for her to get her own doctor, a doctor of her own choosing, because it was difficult to get in the hospitals in San Francisco without reference from a private physician?

A. You are absolutely mistaken. I said no such thing at all. In fact, the doctor was arranged for when I got there.

Q. You are quite certain about that?

A. I made no arrangements for any doctor; I am very certain of that. She told me she had arranged for a doctor, her daughter had.

(Testimony of Alex F. Hoffer.)

Q. You are certain, are you, that you did not ask her to do that?

A. I, as an individual, did not ask her to do that; that is very correct.

Q. Didn't you, at the time when you came into the lobby, insist that Mrs. Cohen be taken back to her room, although she wanted to be left on the settee?

A. I did not insist. I asked her if she didn't want to go to her room.

Q. What did she say? [271]

A. She said no.

Q. How did it happen that she went to her room?

A. Later on she said she wanted to go. After I talked to her, I talked to her at the time and found out that she had called her doctor—her daughter had called the doctor and made arrangements—she wanted to stay there, didn't want to stay up in the room. There was a room upstairs for her. Why, I went down in the back of the house and made my rounds and ordered my groceries and things of that kind.

Q. Isn't it true that you wanted her up in the room and out of the sight of the guests in the lobby and you took her up to her room, despite her—

A. I did not take her to her room.

Q. Or arrange to have her taken to the room?

A. I did not.

Mr. Melchior: That's all, sir.

(Testimony of Alex F. Hoffer.)

Redirect Examination

Q. (By Mr. Sedgwick): Mr. Hoffer, about how many people come in and out of the hotel a day through the lobby?

A. Well, we have an average house count of about 225 people a day in the house and those people will come and go at a minimum of once a day, so you got 450 at the very minimum trips made there. I think it should be safe to say a thousand trips a day would be probably somewhere correct.

Q. At what time did you arrive at the hotel that morning? [272]

A. At twenty minutes to eight.

Q. Do you have any particular reason for setting that time?

A. Yes, for the reason that I normally go to work at eight o'clock, eight to five. My daughter works at a bank and I take her to work at about five minutes to eight. If I get her there 20 minutes to eight, she doesn't like it and I was there early for some reason that I don't know and I know I marked it in my mind, "Good gracious, why should I pick this time to come early when something like this happens?"

Mr. Sedgwick: That is all.

Mr. Melchior: No further questions. [273]

* * * * *

(Proceedings had outside the presence of the jury.)

(Motion made by defendants to dismiss as to the Western Hotels. Reported but not made a part of this transcript.)

(Upon hearing the motion, the motion to dismiss was granted.)

The Court: Now, so far as the instructions are concerned and your objections to them, I will tell you what my practice is and if there is anything you want me to do about it different than I do, why, if you will suggest it, I will give some thought to it.

Now, my practice is to charge the jury orally. I don't read the requests and I don't read anything that I have written, more than a few notes. You will find on these three or four little sheets of notepaper my charge to the jury, notes that I have and from which I am going to charge.

Now, this is a simple case. It's an important case to the people concerned, but in terms of trying thousands of cases a year which I try this is a simple case. I shall turn to the jury and talk to them about it face to face. I have never had any confidence that you're helping the jury much by reading a bunch of requests to them.

Now, the tack I shall take is to give the usual charge on the duty of a proprietor of a property to an invitee, and I shall discuss that. If there is any deviation from that duty, there is a breach and there may be negligence. I will [274] leave it to the jury the question whether or not the proprietor of the hotel or his employees, any of them, failed to exercise ordinary and reasonable care and

diligence in the maintenance and care of that carpet in the lobby, because that's all we are concerned with, no other negligence charged.

Mr. Melchior: That's correct.

The Court: And I shall ask the jury to determine whether or not, if they find some negligence, if any, it is the direct and proximate cause of this lady's injuries, and I shall leave to the jury the question whether or not, taking into account all facts and circumstances in evidence, Mrs. Cohen failed in any wise to exercise ordinary and reasonable care and prudence for her own safety, and if they find that she failed in any wise so to do and that failure contributed to her injury, then they are to find their verdict for the defendant in this case. That is, the defense of contributory negligence, I suppose in California, as elsewhere, is a defense to negligence.

And I shall charge the jury that since Mrs. Cohen was a guest of the hotel, that if they find that the proprietor of the hotel or employees knew of any dangerous condition, if they find there was a dangerous condition, it is the duty of the people, the officers, the employees, to notify either of them; if they don't, why, there is liability. And then I shall charge the jury that if they find either the hotel or its agents was lacking in ordinary and reasonable care and diligence to maintain [275] it properly, keep that carpet up, that it caused the injury, directly and proximately caused the injury, and if they find that Mrs. Cohen was not in any wise negligent or if she was negligent in

such a way that didn't contribute to the injury, then I will say to them now you come to the question of damages. And I shall say to them that it is my duty to charge you on the issue of damages as it is my duty to charge you on all issues in this case, that I don't want you to assume that by talking about damages I am indicating any views of my own on the subject of whether or not there is negligence on either party in this lawsuit. It's not my job to do so; you are the sole judges of those questions. I charge you on the subject of damages merely because it is one of the things you are going to have to consider and it is my duty to give you the law on that subject as well as on the other subjects. Then I shall give the usual charge on damages, pain and suffering and all the rest of it.

Now, you have some special damages here and the special damages you have spelled out. I am going to have to talk to the jury about that; I am not going to talk about that, talk about those in a very general way. I am going to charge them generally; I am not going to make any comment on the evidence in this case. I don't think it calls for any. I shan't intrude my views on them.

So that is about what I am going to do. Now, I [276] notice upon the bench when I came back today the defendants have additional jury instructions. I haven't read those additional instructions and I don't know whether that will have anything in it that I am going to add or not. That is about the way I charge, and I shall take some of the

things from both of your requests. I have some notes here.

Oh, yes, I am going to talk about the burden of proof. The burden is upon the plaintiff in a case of this kind to produce evidence before the jury which they believe and which satisfies them by a preponderance of the evidence that the hotel was either negligent or the hotel people knew of the danger and failed to inform her; the burden is upon the plaintiff to show that if there was negligence that it was the direct and proximate cause of the injury and the burden is on the plaintiff to show that injury by a preponderance of the evidence.

On the subject of contributory negligence, the burden of proof here in California is the same as it is generally in the United States as an affirmative defense, and the burden is upon the defendant to produce evidence which the jury believes and satisfies their minds by a preponderance of the evidence that Mrs. Cohen was lacking in the exercise of ordinary and reasonable care for her own safety and that negligence, if any they find, contributed to the injury she has suffered, she can't recover. [277]

It looks like I am going to give Plaintiff's No. 3—I have got Plaintiff's No. 3 on here—and No. 4 and Plaintiff's Exhibit 7. I don't mean to say I am going to read it to them; I am going to give the substance. Plaintiff's No. 8, you want those in—am I going too fast for you? Take a look at these overnight. I am not going to do it now.

Mr. Sedgwick: No. 8 was one, your Honor?

The Court: No. 3, No. 4, No. 7, No. 8, Plaintiff's No. 9, invitee, I am going to cover that. Also going to say that a corporation acts through its officers and employees and I am going to say that the knowledge of the officers and employees are attributable to the corporation. There is no corporation involved here, is there?

Mr. Melchior: No, your Honor.

The Court: No corporation involved. So I better get rid of that one. Whatever the Western Hotels is involved in I won't give.

Now, of course, I should give, I suppose, the owner of the place is responsible for the acts of the employees,—agency, in other words—that is involved here, and I suppose we ought to give one on agency.

Now, Plaintiff's No. 23, 24, 25 and 26 on damages, I am going to give the substance of that. I am not going to read it.

Life expectancy, I won't need to give any charge [278] on it; you are going to argue that to the jury.

Mr. Melchior: Very well. I did not supply the age, the number of years at the time, your Honor, because I wanted to obtain the agreement of counsel to that.

The Court: Now, her sick or annual leave, is there any problem about that?

Mr. Melchior: I think it is clear that under the law I have submitted this charge that reimbursement from an extraneous source—

The Court: I think that is clear. I have had that problem before, of course, as I go around. That is generally so. I don't know whether the law of damages in California is any different.

The fact that the United States Government allows her sick or annual leave which compensates her for the time she is away is not to be taken into account at all; if the defendant is negligent, she is entitled to recover anything from them, why, you can't depend on the basis somebody else has paid you.

Mr. Melchior: That's our instruction No. 30.

The Court: I had a case like that over in Topeka, Kansas. I travel all over this part of the country. The case there was whether the plaintiff could recover against the defendant for damages, though an employees' insurance group paid the hospital bills of some \$6,000. Of course, the Kansas law was clear. You don't need that. [279]

I am going to give Defendants' No. 6 and 7, in effect. That is concerned with the definition of negligence, and I think that is defined properly there.

I am going to say, as the defendant has asked me to, that the hotel is not an insurer. Of course, the hotel is liable only if the hotel has been negligent, if that negligence has directly and proximately caused her injury and if she isn't negligent, such negligence contributed to her injury.

Now, contributory negligence. I am going to cover that about the way you do in Defendants' No. 14. That is about the way I had intended to proceed and I was very apprehensive this morning.

I came back on the bench—I had been to Salt Lake for a few days and I got here yesterday and I came back and this desk was all cleaned up—a beautiful housekeeping job here—and I thought my little notes that I had left here had all been disposed of and thought I would have to do that all over. My Clerk, who has assisted me so much, had placed those under the blotter, so we have them.

Now, is there anything else you want to take up with me about those instructions? I don't go through them and say give or refuse or modified or anything like that. When I get through the substance of both of your requests are going to be there. I am not going to give them the way they are requested, maybe a different emphasis. I found out that the difference between the requests, the law as stated, was a difference in emphasis. [280]

Mr. Melchior: Certain. I certainly have no objection whatever to your Honor's proposed charge as you have outlined it. I would like to make this one request. Our Supreme Court decided about six weeks ago, the case on which I submitted a number of instructions, Laird against T. W. Mather, Incorporated, 51 Advance California Reports 208, and there are certain matters in that with respect to contributory negligence under such circumstances which are covered in my Instructions No. 18, 19 and 20.

The Court: I am not going to give that specific --you think that the California case is any different

from the broad statements I have just been making about it?

Mr. Melchior: It is a little more specific.

Mr. Sedgwick: It hasn't changed anything, your Honor.

The Court: Contributory negligence?

Mr. Melchior: That's right. In effect—I will read the captions of my 18, 19 and 20 I think sets forth what I propose, contributory negligence with respect to unanticipated danger, failure to observe obvious danger and assumption that the way is clear. I have taken those verbatim or substantially verbatim from that case.

The Court: From the opinion?

Mr. Melchior: From the opinion, yes. [281]

The Court: Well, you see, that Court was not charging the jury. There is a lot of difference between sitting back in your chambers and writing out a little treatise on the law than turning around and talking to the jury about the case. In fact, the longer I work on the court the more I believe that an Appellate Court judge should be a trial judge for a while.

Mr. Sedgwick: I certainly would agree with that.

Mr. Melchior: I agree with that.

Mr. Sedgwick: They ought to have three months a year on a—

Mr. Melchior: Well, as I said earlier out of the hearing of the jury, I am not a personal injury lawyer, but I have done a lot of trial work in tax cases, and I very definitely agree with your [282] Honor.

* * * * *

Mr. Melchior: Certainly will be.

And the only other point that I wanted to make was with respect to the Western Hotels. I think my position on that is clear. I didn't know until about three o'clock this afternoon that the position would vary from that in the pleadings.

The Court: You don't need to raise that again. You have a record on it.

Mr. Melchior: I just wanted to protect my record.

The Court: Well, you certainly made your record on it.

Call the jury.

(The jury returns to the courtroom.)

The Court: I said that I would allow you to ask those four or five questions tonight, but I notice it is ten minutes to five; it is time we went home.

Ladies and gentlemen of the jury, while you are away from us don't talk about this case with anybody and don't permit anybody to talk to you about it. We will reconvene tomorrow morning at ten o'clock. I will tell you what you can expect in the morning. There will be just four or five more questions by the plaintiff and perhaps a question or two by the defendant on cross-examination, and then counsel are going to address you. Each one will tell you what they think the evidence proved and what they think the other fellow hasn't proved, and then the Court will charge you concerning the

law that controls this case, [283] and then we will submit it to you. [284]

* * * * *

Mr. Sedgwick: Now, if your Honor please, before we rest may I offer for filing the amendment to the answer to conform to the proof in accordance with the Court's order?

The Court: Do you have any objection?

Mr. Melchior: No objection. I have the objection which I had yesterday noted on the record, but no objection as to the form.

The Court: The amendment is allowed. [286]

* * * * *

Instructions to the Jury by the Court

The Court: Ladies and gentlemen of the jury, you have heard the evidence in this case. You have listened to counsel and now it becomes your duty and my obligation for you to listen and me to tell you what law controls in this case.

Now, when you were sworn in at the beginning of this trial I admonished you that you should lay aside all prejudice, bias, passion, sympathy; all of those considerations you must leave outside the jury room. You took an oath that you would do that.

I also admonished you that you should decide this case on the evidence, and I told you that the evidence would consist of the testimony as it falls from the mouths of the sworn witnesses who sat there on the chair and whom you observed; and

the evidence also consists of the exhibits which have been received in evidence here.

Now, it is your duty, your solemn obligation to decide this case on that evidence, laying aside every other consideration of any kind or nature whatsoever.

This suit is brought by Mrs. Cohen, Mrs. Lucy Cohen, of Washington, D. C., against a man and his wife who are named here and whom I don't know, of course, and you don't know, Mr. E. B. DeGolia and his wife, two individuals who own the Maurice Hotel and who live in San Francisco. [287]

This case is here in the Federal court because a citizen of the District of Columbia is suing a citizen of California. We have a statute that confers jurisdiction on this court where diversity of citizenship exists, and that's what I mean by "diversity," the citizen of one State or the District of Columbia is suing a citizen of another state. That's why the case is here in Federal court; it wouldn't be here otherwise. If they were both citizens of the same State, it would be over in the State court.

As I say, Mrs. Cohen is suing Mr. DeGolia and his wife and she claims, first, that Mr. DeGolia and his wife were the owner of the hotel and were negligent. Now, the claimed negligence concerns only the condition of that rug—nothing else.

Secondly, Mrs. Cohen claims that the negligence, if any, of the hotel owners was the direct and proximate cause of her injury. Thirdly, Mrs. Cohen claims that she has sustained an injury resulting

from the negligence of the defendants. Fourthly, she claims damages in the amounts that have been mentioned to you.

Now, ladies and gentlemen of the jury, on the other hand, the defendants, Mr. DeGolia and his wife, the owners of the hotel, deny that they were in any wise negligent. They deny that the negligence, if any you find was the direct and proximate cause of her injury. [288]

The defendants deny that she has been injured in the amounts—suffered damages in the amounts and to the extent claimed.

The defendants claim that Mrs. Cohen was herself negligent the morning of this injury and that her negligence contributed in some measure, at least, to cause the accident and the injury.

Now, I have attempted to state the claims and the denials of the respective parties to this lawsuit so that you may have clearly in mind what the issues are which the Court is going to submit to you and call upon you to decide for us.

Now, the first issue in this case that is presented by the claim of Mrs. Cohen and the denial of the defendant is the issue of negligence.

Now, I must tell you about that, ladies and gentlemen of the jury. To start with, I will say to you folks that the mere fact that Mrs. Cohen tripped or fell, if you should find that she did trip or fall on the rug that morning, the mere fact does not entitle her to recover anything here. She is entitled to recover only if the defendants were in some way blameworthy, in some way responsible for her tripping and falling.

Now, the hotel proprietors, not only these hotel proprietors, but others, folks who serve the public, are not insurers, they don't insure against injury and they don't carry [289] that kind of legal responsibility. Mr. DeGolia and his wife, the defendants here, are going to be responsible and liable only, ladies and gentlemen of the jury, if they were negligent in their care and maintenance of the carpet in question at the time and place of this injury.

Now, what do we mean by "negligence"? Negligence, ladies and gentlemen of the jury, means that a defendant has either acted in some way that an ordinarily prudent person would not have acted, or has failed to act in such a way as an ordinarily prudent person would not have failed to act.

In other words, negligence may be commission or omission; it may be an act or a failure to act. The standard to which the law holds us all in our duty to others as it relates to the question of negligence is, ladies and gentlemen of the jury, that we must act as an ordinary, reasonable person would act under the same circumstances, having regard to all of the facts and circumstances in the case.

So what we are really asking you to decide first, ladies and gentlemen of the jury, is, did the hotel proprietors, or their servants or agents, do anything here that an ordinarily prudent person would have done, or did they fail to do anything here that an ordinarily prudent person would have done. The standards to which these people are held is to act in a way in which ordinarily prudent people

act in like circumstances. So the first thing to do is to decide that one. [290]

Now, if you decide that against the defendants, you still are not entitled to give Mrs. Cohen your verdict; you have another issue you must decide and that issue is, if you find that the proprietors, or their servants or agents, failed to do something an ordinarily prudent person would have done or did something an ordinarily prudent person would not have done—if, in other words, you find them negligent, then next you must find, in order to return a verdict for Mrs. Cohen, you must find for her on the issue was the hotel's negligence, if any you find, the direct and proximate cause of her injury.

Now, if you find that it was, you still may not return a verdict for Mrs. Cohen unless you also find that Mrs. Cohen herself, on the occasion of the morning in question, was acting with ordinary and reasonable care and prudence for her own safety. If you find she did not, ladies and gentlemen of the jury, that is a defense to any recovery whatsoever. That is what is called contributory negligence.

Contributory negligence means simply that if Mrs. Cohen failed to act as an ordinary prudent person would have acted on that occasion and that if her failure to look out for her own safety by so failing to act contributed in any measure to cause her injury, she may not recover and your verdict should be for the defendants.

Now, ladies and gentlemen of the jury, Mrs.

Cohen claims the defendants were negligent, that negligence was the [291] direct and proximate cause of her injury and that she sustained an injury from it and suffered damage. On all of those questions, ladies and gentlemen of the jury, Mrs. Cohen, the plaintiff in this case, has the burden of proof.

Now, by "burden of proof" I mean that Mrs. Cohen carries the burden of producing witnesses here and exhibits whom you believe and which satisfies your minds by a preponderance of the evidence.

Now, ladies and gentlemen of the jury, on the issue of contributory negligence, that is to say that the defendant claims that Mrs. Cohen was herself negligent, she wasn't acting with ordinary care and prudence for her own safety, and that that contributed to cause the accident; on that issue, ladies and gentlemen of the jury, the defendant has the burden of producing evidence which you believe and which satisfies your minds by a preponderance thereon.

When I use the word "preponderance," or the phrase "preponderance of the evidence," I mean, ladies and gentlemen, simply the greater weight of the evidence.

Ladies and gentlemen of the jury, there are only two parties left in this lawsuit, the plaintiff on the one side and the DeGolias on the other, the Western Hotels, Inc., having been dropped out of this lawsuit; the lawsuit has been dismissed as to them.

Ladies and gentlemen of the jury, in a case of [292] this sort you are to exercise sound judgment and good common sense. That's why we have a jury here. The jury is a fair cross-section of the citizenry of the State. We don't leave these questions to a man in an ivory tower who is disassociated from the everyday affairs of life. We call in a jury, lay people, a fair cross-section of the citizenry, and we do that to have you bring to bear on the solution of the problem the good judgment and sound common sense of the citizenry at large.

Now, up to this point, ladies and gentlemen of the jury, I have been addressing you on the subject of liability, I haven't said anything about damages at all. If you find that the defendant was not negligent, as I defined it to you, or if you should find that the negligence, if any you should find, was not the direct and proximate cause of the injury, then your verdict should be for the defendant in this case. No cause of action. Likewise, if you should find that Mrs. Cohen failed to exercise ordinary and reasonable care for her own protection and safety, that that contributed to cause the accident and injury, your verdict should be for the defendant in this case.

On the other hand, ladies and gentlemen, if you find the defendants negligent in the case in the care and maintenance of the carpet at the time and place in question and if you find that that negligence, if any, was the direct and proximate cause of the accident, then you should return your verdict

for the plaintiff, unless you also find that [293] Mrs. Cohen was herself negligent, was herself wanting in the exercise of ordinary and reasonable care and prudence for her own safety, in which event you should find for the defendant.

Now, should your verdict on the subject of liability, about which I have been addressing you, be for the plaintiff, then you should assess her damages, ladies and gentlemen of the jury. I would not want you to assume from anything I say on the subject of damages that I am indicating to you in any way at all that I think she ought to recover, or, on the other hand, that I think she ought not to recover. It is my duty to tell you what the law is about all the questions in the case, and one of the questions is damages, and so it is my duty to tell you what the law is on the subject of damages, and when I do it I don't want you to make any assumptions or draw any inferences that I am indicating one way or the other whether she ought to recover.

Now, on the subject of damages, ladies and gentlemen of the jury, if your verdict on liability is for her, you are entitled to take into account these elements in arriving at your verdict: Take into account her medical expenses, doctor bills, hospitalization, sedatives and anesthetics, drugs, all those things, things of that nature, without attempting to spell them all out. You may take into account her actual, reasonably necessary out-of-pocket outlays or articles of that kind and other things that you find, if you do find, are reasonably

necessary as a result of the defendants' conduct, if you find them in any wise negligent and wrongful and your verdict is for the plaintiff. You may take into account her physical injury that she sustained, the extent of her disability, if any you find, how long it will last in the future, if you find it is reasonably likely to do so. You may take into account, ladies and gentlemen of the jury, the pain and suffering that she endured at the time of the accident and since up to the present, pain and suffering, if any you find that she is sustaining now and any future pain and suffering which you find, ladies and gentlemen of the jury, in the exercise of your good judgment and sound common sense is fairly and reasonably likely to be sustained in the future.

Now, ladies and gentlemen of the jury, if there is a disability and you find it and it reduces her earning power, her earning capacity, you may take that into account. It is for you to determine. If you find, ladies and gentlemen of the jury, that she lost any income by reason of being ill, undergoing an operation, hospitalized or crippled, disabled in any way, as a consequence of the accident, you may take that into account in arriving at your verdict.

Now, ladies and gentlemen of the jury, in the main the theory of the law with respect to damages is that damages are compensatory. We attempt by the payment of damages to return the injured person to somewhat near the *status quo ante*, and by [295] that I mean to compensate her

for her loss, not to punish the defendant, make her whole again. That's the theory.

Now, ladies and gentlemen of the jury, one word of caution about all of these questions and particularly the question of damages. You are to decide these questions on the evidence. Your verdict should not be based upon whim, imagination, fanciful reasoning of any kind. Look at that evidence. Your verdict must be based upon the evidence, the evidence only. And from that evidence you may allow her, if you find she is entitled to recover at all, damages that are reasonably necessary that she has sustained or reasonably necessary to be sustained in the future, and the damages must, in any event, be fair and reasonable.

Now, ladies and gentlemen of the jury, you are called upon to perform here one of the most solemn duties that we know. You are called upon, ladies and gentlemen, to do justice between Mrs. Lucy Cohen, the plaintiff, and Mr. and Mrs. DeGolia, the defendants. Do it objectively, fairly, and base it upon the evidence in the case.

Ladies and gentlemen of the jury, you are the sole judges of the questions the Court is submitting to you; you are the sole judges of the facts in this case and you are the sole judges of the credibility of the witnesses. By "credibility of the witnesses" I mean it is for you to determine what you will believe and whom you will believe. If there is any conflict that [296] you find in the testimony of the witnesses here, it is your duty to reconcile the conflict from the evidence, if you

can; if you can't reconcile it, then it is for you to believe what you will and whom you will. It is for you to determine, ladies and gentlemen of the jury, where the ultimate truth in this case lies.

Mrs. Cohen was a guest at the hotel. As a guest she was, what we call in the law, an invitee. She was invited there along with the public generally.

The Court charges you that the hotel owes to her the kind of duty I have already defined, the duty to exercise ordinary, reasonable care and prudence to maintain that carpet in reasonably safe condition. If the hotel knew about some dangerous condition, the hotel is under a duty to disclose that to the invitee. It is for you to determine whether there was any such situation as that in this case.

Mrs. Cohen is an employee of the United States Government and as such employee she gets sick leave and she gets annual leave and all that amounts to is, she can be off sick, she can be off on a vacation for a certain period each year and draw her pay for it. Now, the fact that the Government paid her while she was off sick, being operated upon, that sort of thing, may not be deducted from the damages you allow her, if you allow her any; the defendant can't take advantage of that. She is entitled to that as well as the defendants. In other [297] words, if you find that she is entitled to recover at all, she is entitled to recover any damages.

Well, ladies and gentlemen of the jury, I have now come to the end of my charge, and I suggest

to you that you, ladies and gentlemen, when you retire to the jury room select one of your number as foreman. I am going to hand you two forms of verdict. One form of verdict finds in favor of the plaintiff and assesses the damages in the sum of blank amount. The other one finds in favor of the defendant or defendants in this case. Your foreman should sign whichever of those verdicts you may arrive at. I instructed the Clerk to put Mr. DeGolia's wife on this verdict, two defendants, E. B. DeGolia and wife—the two Latin words on the verdicts means "and wife." It is a way lawyers sometimes show their erudition. I was showing off a little to the Clerk this morning; he hadn't heard about that one.

Ladies and gentlemen of the jury, in order to arrive at a verdict you all have to agree upon it. In this court the verdict must be unanimous. I don't mean to suggest that you may not disagree, if that be the state of your mind, but I do suggest that in order to return a verdict either way there must be unanimous agreement.

Now, counsel, under the rule in the Federal courts you are entitled I believe to take your exceptions to the Court's charge in the presence of this jury before they retire, but out [298] of their hearing. I don't know who wrote that rule—he has never tried a lawsuit—so that requires you gentlemen to come up here and whisper to me while the court reporter comes up to the bench and take it all down. The jury can't hear it, but it must be in your presence and before you retire.

Now, it is my practice to suggest to counsel that the exceptions be taken after the jury retires and out of their presence and that the exceptions may be deemed to have been taken in conformity with the rule.

Mr. Sedgwick: So stipulated, your Honor.

Mr. Melchior: Very well, your Honor.

The Court: There is one further thing, and that is the matter of the exhibits. Sometimes an exhibit that ought to go into the jury room doesn't get in there; sometimes an exhibit that ought not to get in does. The result of that is, after the verdict comes in we have to try the whole lawsuit all over again. Now, I assure you that isn't going to happen.

I make another suggestion to you, counsel, and that suggestion is that you folks, counsel of the respective parties, get these exhibits together and in order and then stipulate your agreement that they are in order and may go in and hand them to the officer, to the court reporter, so that we have a record that this obligation is upon you and it is your responsibility, and that if you fail in it nobody is going to get a new trial.

Now, thank you very much, ladies and gentlemen of the jury. [299] I want an officer sworn here and then I'll have a marshal take you folks to lunch—I see it is about time to go out—and he will take you out to your lunch. And get them a good luncheon, Mr. Marshal.

(Whereupon the Marshal and Bailiff were sworn by the Clerk.)

The Court: If you ladies and gentlemen of the

jury will go with the Marshal, he will find some convenient place where they serve food. You may be excused.

Now, Mr. Marshal, when you bring them back from lunch just take them into the jury room; you won't need to bring them into the courtroom again.

(Whereupon at 11:50 o'clock a.m. the jury retires from the courtroom.)

(The following proceedings were had out of the hearing of the jury:)

The Court: All right. You folks may take your exceptions to the Court's instructions.

Mr. Melchior: I am very well satisfied with the charge, your Honor, except for one very minor point, which is that I believe you stated to the jury that the defendants were under a duty if they knew of defects to take reasonable steps to give notice. I think they would also have been under a duty to take reasonable steps to correct them, either to correct them or to give notice. [300]

The Court: I think I covered that phase of it. All right.

Mr. Melchior: Yes. And of course, as I stated yesterday, I would have requested the Court to charge along the lines of Laird against Mather, the new California case.

The Court: Well, all right. I don't want to engage in conversation with you about this. I want to give you a full, free opportunity to take what exceptions you wish on the record. I don't ordinarily discuss these exceptions, just give you any record you want.

Mr. Melchior: Very well. It was our request to charge 18, 19 and 20 which covered that matter and I except for the record to your failure to give those requests. Thank you very much, your Honor.

The Court: Thank you.

Mr. Sedgwick: No exceptions, your Honor.

The Court: All right. The court will be in recess.

(During the recess the following proceedings were had:)

Mr. Sedgwick: We stipulate that all the exhibits are in order and may be presented to the jurors, together with the forms of verdict.

Mr. Melchior: As handed to Mr. Magee at this time. That is stipulated. [301]

(Whereupon at 2:05 o'clock p.m. the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: Your Honor, we have.

The Court: Hand it to the officer, please.

Read it to the jury.

The Clerk: Ladies and gentlemen of the jury, harken unto your verdict as it shall stand recorded. We the jury find in favor of the defendant. Signed "David A. Nicolaides," Foreman.

So say you all?

The Jury: Yes.

The Court: All right, ladies and gentlemen of the jury, you may now be excused from attendance from the court until further notice.

The court will be in recess. [302]

[Endorsed]: Filed April 14, 1959.

[Endorsed]: No. 16455. United States Court of Appeals for the Ninth Circuit. Lucy K. Cohen, Appellant, vs. Western Hotels, Inc., and E. B. DeGolia, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: May 1, 1959.

Docketed: May 4, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16455

LUCY K. COHEN,

Plaintiff and Appellant,

vs.

WESTERN HOTELS, INC., a Corporation, and

E. B. DeGOLIA,

Defendants and Respondents.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Appellant intends to rely in the presentation of her appeal herein upon the points appearing in her "Statement of Points on Which Appellant Intends to Rely", filed in the District Court and contained in the typed record, except that point 5 thereof is amended to read as follows:

"5. That the District Court erred in unduly restricting plaintiff's proofs and the presentation of such proofs by plaintiff's counsel."

Dated: May 1, 1959.

FREED & FREED,
/s/ By KURT W. MELCHIOR,
Attorneys for Plaintiff and
Appellant.

[Endorsed]: Filed May 4, 1959. Paul P. O'Brien,
Clerk.

